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ABSTRACT

According to its chairman, the Subcommittee on Employment Opportunities called the hearing in order "to gain some fuller understanding of the nature, scope, and purpose of the significant modifications of ... policies, regulations, and guidelines" proposed by the Equal Opportunity Commission (EEOC), particularly as they affect enforcement. The booklet contains prepared and supplemental statements and materials from Barry Goldstein (assistant counsel, NAACP Legal Defense and Educational Fund), William Robinson (director, Lawyers' Committee for Civil Rights under Law), and Clarence Thomas (chairman, EEOC). Also included are letters to the Subcommittee chairman from Representative Cardiss Collins and from Helen C. Gonzales (associate counsel, Mexican American Legal Defense and Educational Fund). (CMG)

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OVERSIGHT HEARING ON THE EEOC'S ENFORCEMENT POLICIES

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, ON DECEMBER 14, 1984

Printed for the use of the Committee on Education and Labor

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OVERSIGHT HEARING ON THE EEOC'S ENFORCEMENT POLICIES

FRIDAY, DECEMBER 14, 1984

House of Representatives,
Committee on Education and Labor,
Subcommittee on Employment Opportunities,
Washington, DC.

The subcommittee met, pursuant to call, at 9:25 a.m., in room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman of the subcommittee) presiding.

Members present: Representatives Hawkins, Williams, Hayes, and Gunderson.

Staff present: Susan G. McGuire, staff director; Edmund D. Cooke, associate counsel for civil rights; Terri T.P. Schroeder, legislative assistant; Edith Baum, Republican staff director; and Bruce Wood, Republican labor counsel.

Mr. **Hawkins**. The Subcommittee on Employment Opportunities of the Committee on Education and Labor is called to order.

The purpose of our hearing this morning is to gain some fuller understanding of the nature, scope, and purpose of the significant modifications of Commission policies, regulations, and guidelines which we have learned largely through newspaper accounts, which the Commission intends to implement. Of particular concern to the committee are the implications these proposed changes may have for meaningful enforcement of equal employment opportunity laws.

Those of us who guided the painstaking and often painful enactment and subsequent evolution of these laws are all too conscious of the careful compromises and balances of interests which have occurred over the years. The resulting policies and enforcement processes have yielded slow, but measurable, gains for minorities and women in their quest for equal employment opportunity throughout the American workplace and are supported by unions and most businesses. Strong and consistent enforcement activity remains necessary to the preservation of current gains and the full achievement of the objectives of this Nation's equal employment opportunity laws.

We welcome Chairman Thomas and the other distinguished witnesses from whom we will hear this morning. We are hopeful that their testimony will aid the preliminary assessment of the Commission's new regulatory and enforcement agenda which we undertake this morning.

I will, however, yield to either one of my colleagues if they wish to make a statement at this point; first to you, Mr. Gunderson.

Mr. GUNDERSON. Thank you very much, Mr. Chairman.

I have no particular opening statement to make. I think this is a worthy hearing, and I look forward to the testimony.

Mr. HAYES. I don't have one either, Mr. Chairman.

STATEMENT OF CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. HAWKINS. With that, we will call upon the chairman of the Commission, Mr. Thomas, who is with us today. Mr. Thomas, we appreciate your appearance before the committee. We think this is the best arena in which this subject can be discussed, and we look forward to your testimony.

We have the prepared statement of yours. You may deal with the prepared statement as you see fit, or you may proceed otherwise.

Mr. THOMAS. Thank you, Mr. Chairman.

First of all, I will not read the prepared statement.

Mr. HAWKINS. Mr. Thomas, I ask you to suspend for a minute. We don't seem to be hearing you too well.

Mr. THOMAS. All right.

Mr. HAWKINS. Thank you.

Mr. THOMAS. I would like to take this opportunity to make sure that we cover not only the matters involving the policy considerations in the future of the Commission but also some of the other matters that the Commission has had to consider over the past couple of years and is considering now.

First of all, I would like to acknowledge the presence of Commissioner Bill Webb, who is immediately behind me, and acting general counsel Johnny Butler, who is sitting with Commissioner Webb.

I would like to also state that as far as I am concerned at the Commission, and this should be noted, that we have an excellent team of policymakers at the Commission level, as well as in the general counsel's office.

I would like to also note that the chemistry at the top level of the Commission is perfect, in my opinion, to make progress over the next few years and that the views on certain policy issues expressed in the media are my personal views and not necessarily those of the other Commissioners, and that also we have respect for each other; we are not clones of each other, and we do not vote in lock step.

Discussions with my staff indicate that your staff's interest is primarily in the recent statements made by me and reported in the media. I would like to note parenthetically that the only thing new about these statements, in my opinion, is that they have been reported in the media.

Your letter of invitation, however, proved to be broader than the concerns raised informally by your staff. Hence, I will note briefly the areas to which the Commission will direct special attention in the near future and in which I am particularly concerned.

In the area of personnel, we simply must train our employees to investigate cases properly, rather than shuffle papers. We have instituted a massive training program over the past 2 years. For example, in fiscal year 1984, we spent $1 million, as opposed to

$200,000 in fiscal year 1982, to train personnel. Without more and more training, EEOC, in my opinion, is doomed to permanent mediocrity.

We will also aggressively eliminate nonproductive employees from our work force. Eighty percent of our budget is spent on personnel. In my opinion, we do not have one slot to spare. My view is very simple. I want those who plan to do nothing to do it elsewhere.

We have, in my opinion, too many hard-working, committed employees to allow their hard work to be jeopardized or dissipated by lackluster employees.

In the policy area, as noted in my prepared statement, we have an extensive policy review program. Although we felt that our first order of business over the past 2 years had to be rebuilding the infrastructure of our agency, we have an obligation, as policymakers, to review all existing policies and explore ways to enhance the enforcement efforts of EEOC.

Based on this obligation and our collective experiences at the Commission, we concluded unanimously that our uniform guidelines on employee selection procedures should be reviewed, as well as our Federal affirmative action regulations. These are just two of the many areas that we felt review would be necessary.

Although we have many similar concerns prompting review we, as commissioners, do not and will not reach conclusions lock step.

As I noted earlier, the views which I expressed in the media are mine and mine alone. I take full responsibility for them. Although my fellow commissioners may agree with me to some extent or another, I do not presume to speak for them.

The third area that I have particular interest in, as a manager, is quality assurance. This is an effort to improve the quality and quantity of our work. We have piloted this program over the past year in several district offices and six FEP agencies. We feel that this program holds great promise for the agency, an agency such as EEOC, which is small, labor intensive, and handles over 70,000 charges annually.

I would like to comment on another area, and that is the composition of our Commission, which I alluded to earlier. As I stated, I think we have an excellent Commission. We are at full strength now with the addition of Commissioner Ricky Silberman. We think that Commissioner Alvarez's appointment to the Commission has been a tremendous asset and his presence, along with that of Commissioner Webb and Commissioner Gallegos, provides us with the kind of chemistry we need to move forward in a positive way.

We have respect for each other. There is tremendous team work at the Commission level, which we hope will filter down throughout the agency. There is pluralism and independence at the Commission level which is demonstrated in the split votes that we have on many issues. In short, the chemistry is conducive, as I said before, to progress, not to petty interests.

We have, as I'll say again, a great working relationship, and for those who have been commissioners at EEOC and who have been at EEOC, this is a rarity.

Another area is enforcement policy. The Commission and the acting general counsel, Mr. Johnny Butler, developed an enforcement policy that I think is ambitious, but attainable. Our desire is to litigate every case in which there is a cause finding.

This demands cooperation between the commissioners and the general counsel. It also demands a good working relationship between the compliance side of our agency and the legal side. We have heard the nay sayers, as we often do at the EEOC, but we believe, as a Commission, that this policy is sound, and it can and will be effective.

In the systemic area, I believe, and the staff has proposed, that it would perhaps be more effective and efficient to place the systemic program in the Office of General Counsel, particularly the litigation portions, since there is considerable overlap in functions. The staff recommendation has not been considered by the Commission nor presented to the Commission at this point.

I would like to also take this opportunity to point out a few accomplishments of the Commission—just a few—over the past 2 years. My belief, after 2½ years as Chairman of the Equal Employment Opportunity Commission, which often seems like an eternity, is that if we wanted to destroy the agency as we have often been accused, we could have committed ourselves to do nothing, make no effort. The agency, in my opinion, would have sunk of its own weight.

I note, for your interest or perusal, the GAO and OPM negative studies which were my greetings to the agency in 1982. Instead, in my opinion, staff, myself, the commissioners, and others have worked to make EEOC respectable. We have restructured the agency, both at headquarters and in the field.

In the field, we emphasized investigation; going back to actually doing the kind of field investigation; hands-on investigations; that are necessary to develop good cases.

We have developed a Commission performance system, one tied into the mission statement of the agency, which we also developed. We have long-range, long-term strategic planning, as well as short-term operational priorities. Again, we did not have this when I came onboard.

We have in place an improved management information reporting system, an appraisal system, staff development and training, which I alluded to before. Those are just a few of our accomplishments.

In the personnel management area, our major thrust was to bring under control, and into concert with other administrative management systems, the area of personnel, which I might add has been heavily criticized by OPM and which was a system that, in my opinion, was antiquated.

We have improved our appraisal system supporting our goals and objectives as an agency. We have conducted position maintenance reviews and classifications in accordance with OPM's concerns. We have provided orientation for our new employees. That is new. We have an executive development program, grade and pay retention. We have established an executive review board, just to mention a few of the things that we have done in the personnel management area.

We have in place now a state-of-the-art automated personnel data retrieval system. Again, as I noted, the personnel system was manual in the past, and that created significant problems for the agency.

In the administrative management area, in my opinion, this was in particularly dismal condition. GAO criticized this area heavily and OPM downgraded our employees. We have upgraded our ADP system. We have an aggressive automation program nationwide. We have purchased more than 150 personal computers, display writers, and other word processors over the past 2 years. We have received rave reviews from our employees, both in headquarters and the field, concerning these acquisitions and the manner in which they assist them in doing their job.

We have upgraded our library at headquarters, which was poorly used or underused when I took over. We have added libraries at our Office of Review and Appeals and in our field offices. Where we had previous library facilities, they have been upgraded

In the financial management area, I will not list in detail all the criticisms of GAO, but I will note for your interest that when I was sworn in on May 17, 1982, GAO issued a study on the same date, May 17, 1982, criticizing the agency's lack of financial management that spanded more than a decade.

As I indicated, the concerns are too numerous to mention here, but suffice it to say that within 2 years we received a clean bill of health from GAO and GAO approved our financial accounting system. Only 64 percent of the Federal agencies have GAO-approved accounting systems. We believe that this is a vindication of our efforts in the financial management area.

Although this is a brief overview of what we have undertaken in the past 2 years, we will undertake a review of policy in the same careful, methodical way in which we approached management changes.

Thank you, Mr. Chairman.

[Prepared statement of Clarence Thomas follows:]

PREPARED STATEMENT OF CLARENCE THOMAS, CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Good morning, Chairman Hawkins, and members of the committee. I appreciate the opportunity to appear before you to respond to any questions you may have regarding the Equal Employment Opportunity Commission's enforcement policies. It is not clear from the letter of invitation in which areas the committee is most interested. Therefore, I will provide you with a brief overview of the most recent policy developments.

It is necessary and appropriate for the Equal Employment Opportunity Commission to review and reexamine regularly its policies, regulations and approaches with respect to the enforcement of the Federal statutes that bar discrimination in employment. Accordingly, the Commission has been, and is, reviewing its policies in a number of areas.

AGE DISCRIMINATION

The Reorganization Plan No. 1 of 1978 transferred authority for the administration and enforcement of the Age Discrimination and Employment Act [ADEA] from the Department of Labor to the Equal Employment Opportuntity Commission. Prior to the transfer of that authority, the Department of Labor had issued its interpretive provisions which permitted pension and retirement plans to discontinue contributions and crediting for employees who worked beyond normal retirement age.

On June 26, 1984, the Equal Employment Opportunity Commission voted to direct its staff to draft proposed regulations that would rescind those interpertive provisions and replace them with substantive rules that would require employers covered by the ADEA to provide pension credits and contributions for employees who work beyond normal retirement age. The Commission staff is completing a draft of such rules. I anticipate that the draft proposed rules will be presented to the Commission in Janaury. Any proposed rules approved by the Commission will be forwarded to other agencies for review and comment, and thereafter will be published for public comment.

To be consistent in our ADEA enforcement policy, on June 26, 1984, the Commission also moved to amend our interpretations regarding the apprenticeship programs to eliminate arbitrary age restrictions.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Consistent with our review process, and because the recordkeeping requirements of the Uniform Guidelines on Employee Selection Procedures [UGESP] were already under review, I made a motion on July 31, 1984, that the Commission expand its present review to a review of UGESP in their entirety. Part of that review will focus on the concept of adverse impact as interpreted by the guidelines.

COMPLIANCE MANUAL REVISIONS

During the past two years, we have been completely revising volume I of our compliance manual as well as substantially revising volume II of the manual to reflect the changes necessitated by the field and headquarters' reorganization.

AFFIRMATIVE ACTION, ENFORCEMENT AND LITIGATION

In support of our goal of increased enforcement, the Commission has determined that in every case in which the district director has found that one of our statutes has been violated and conciliation has failed, that case should be submitted to the Commission, as a whole, for litigation consideration.

Additionally, the Commission will be looking at new remedial approaches and will consider the totality of circumstances before bring suit, in an effort to ensure that the remedies which the Commission seeks are effective and practical.

With respect to the committee's inquiry concerning the Commission's litigation program, the general counsel supervises litigation conducted by the regional attorneys in the field litigation units within the Commission's twenty-two district offices and in the Legal Enforcement and Coordination Division of the Office of Systemic Programs.

Currently, the Regional attorneys are prosecuting approximately 537 cases. In fiscal year 1984, the regional attorneys filed approximately 226 cases on the merits and 88 subpoena enforcement actions on behalf of the Commission. In the same year, the field litigation units resolved approximately 195 cases on the merits, 88 subpoena enforcement actions, and recovered approximately $38,852,869 in monetary benefits.

With regard to systemic litigation, the Commission approved twenty cause systemic decisions, eighteen systemic settlements and authorized seven systemic cases for litigation for fiscal year 1983 and fiscal year 1984. We currently have ten systemic cases in litigation. One nationwide suit which was approved in fiscal year 1984 was recently settled, *EEOC* v. *Cargill, Inc.*, resulting in $1,200,000 in backpay to identifiable individuals, goals and timetables, and a restructuring of the promotion and termination policies.

In the case of *EEOC* v. *Sears*, the trial began September 4, 1984. The Commission is trying two issues—hiring and promotion into the Commission sales positions and denial of equal pay. We anticipate that the trial will continue for several months.

PUBLIC SECTOR ENFORCEMENT EFFORTS

One major responsibility of the Commission that we are just beginning to review is our assignment under section 717(b) of the Civil Rights Act of 1964, as amended, to issue rules, regulations, orders and instructions to assure that each Federal agency "maintain[s] an affirmative program of Equal Employment Opportunity." It is particularly necessary for the Commission to examine its policy in this area now because EEO Management Director 707, which constitutes the Commission's current instructions to Federal agencies on this subject, applies only through fiscal year 1986, and the Commission must therefore soon decide what rules, regulations, orders or instructions to issue for subsequent years.

The Commission is now reviewing EEO Management Directive 707, with particular emphasis on (1) the concept of "underrepresentation" as applied in that directive; (2) the use of numerical "goals," timetables to achieve them, in Federal agencies' affirmative programs of equal employment opportunity; and (3) the development of mechanisms to ensure compliance with rules, regulations, orders and instructions issued by the Commission pursuant to section 717(b).

We are also in the process of developing a new procedure for the resolution of Federal employees' discrimination complaints.

SYSTEMIC PROGRAMS

In terms of the organizational structure, we do not anticipate any major restructuring of the Commission during fiscal year 1985. However, I am reviewing a proposal to restructure the investigations division and the litigation division of systemic programs. This proposal will soon be brought to the full Commission for a vote.

During the 1982 headquarters reorganization, the Office of Program Operations was created to supervise and monitor the processing of all administrative charges. Currently, the Office of Program Operations, through public sector programs, provides direction for and monitors the processing of complaints filed against Federal agencies. Through the three regional directors, the Office of Program Operations oversees the administrative processing of the approximately 60–80,000 charges filed each year by private charging parties; and, through systemic programs supervises the field and headquarters processing of commissioner-initiated charges alleging that respondents engaged in a pattern and practice of discrimination.

The Commission is of the view that the consolidation of all charge processing activities within one office—Program Operations—has generally been successful. Communication and coordination among varied program areas has substantially improved. However, our experience of the last two years also teaches us that some "fine tuning" of the headquarters reorganization is still necessary. Specifically, the activities of the headquarters systemic programs—targeting of respondents, the comprehensive investigation of larger employer personnel practices, conciliation of multi-issue complaints, and complex litigation—perhaps should more appropriately be directly controlled by the Office of General Counsel. These charges form the portfolio of the Headquarters Litigation Enforcement division. Accordingly, I have instructed staff to take a look at the Investigations Division and the Litigation Enforcement Division of systemic programs to determine how we can more effectively manage and use those divisions.

I will be happy to answer any questions you may have at this time.

Mr. HAWKINS. Well, thank you, Mr. Thomas.

Mr. Thomas, as I note your particular reference to views that you made in the media, as opposed to Commission views, it is a little difficult to understand how basic policy changes can be suggested in newspapers without your having some basis for discussing them with the Commission, or the Commission may be of a different view from those that you have expressed.

Are we to understand that those views that you have expressed publicly pertaining to some of the basic policy questions, the criticism of the *Griggs* decision or the question of use of numerical goals in affirmative action programs and a host of other views, that these are views of yours and not necessarily those of the Commission? Have they not been discussed by the Commission nor have you been authorized by the Commission to state such views? And upon what are those views based?

Mr. THOMAS. Well, first of all, those are the same views I have expressed for 2½ years. As I have indicated, the only difference is that the media has now chosen to print them.

The only action that the Commission has taken with regard to the uniform guidelines is to vote to review those guidelines and, again, that was not a pressworthy matter then since we voted to do that this summer, and that was not reported.

The views that I have expressed are views that I have expressed in speeches, views that I expressed prior to going to EEOC, and as I indicated, they are my personal opinion. I have expressed those views particularly in the closed sessions of our meetings since the cases have come up in closed session, and I think it is pretty well known around the agency what my concerns have been in particular cases.

The Commission on numerous occasions has not gone the way that I would have gone in a number of cases. The policies at EEOC, as you are aware, are developed by a vote of the full Commission. Thus far, all we have done is to vote to review the uniform guidelines. That is, from a Commission standpoint, the sum total of it.

Mr. Hawkins. Let us be a little more specific, then, because they have been reported as basic policy changes.

In 1983, in a letter to the Attorney General, you said that the use of goals in Federal employment is presently required, has been required for some time, and is necessary for this Commission to carry out its responsibilities. Then you said, absent this information, neither the EEOC nor Congress can know whether increases in the employment of minorities and women, such as the ones you cite, represent an improvement in the Department's equal employment opportunity efforts, referring, of course, to the Department of Justice.

You seem to have been taking exception to the practices of the Department of Justice. You seemed to have been supporting goals and compilation of numerical data. Now, that certainly is not true of some of the recent statements that you have made in criticism of those very points. We commended you in 1983 because we thought that you were strongly upholding the law, but some of the recent statements to the contrary represent a change in your EEO perspective.

Are you now saying before this committee that you support those statements that you made in 1983 in the letter which you wrote to the Attorney General? Is that your position today?

Mr. Thomas. Mr. Chairman, the letter which I wrote to the Attorney General of the United States was based upon our existing regulations on Federal affirmative action. We are proposing, as a Commission, to review those regulations. As I have indicated on numerous occasions, that if there are regulations, I will uphold them if they are in place. I do not believe that individual, selective, civil disobedience, with respect to those regulations, is in order.

The appropriate step for the Commission is to either have the regulations and enforce them or change the regulations. I wrote that letter and I have taken stands with respect to Federal agencies supportive of the existing regulations of the agency.

At the same time, beyond enforcement as a Commission, we have an obligation which I have stated on numerous occasions, again, to review our existing policies. That review may not necessarily be consistent, from an outcome standpoint with my views. I have one vote at the Commission. My views are well known and have been well known at the Commission. I will support the existing regulations of the Commission. I will support the views of the Commission as an enforcement officer, even if I do not agree with those views.

The opinions expressed in that letter represent the views in existing policy and existing regulations of the Equal Employment Opportunity Commission.

Mr. HAWKINS. Well, you are saying that as of that time that those were not your views but were rather the views of the entire Commission when you made that statement to the press? Are we to conclude that is what you said?

Mr. THOMAS. Well, Mr. Chairman, I have raised on numerous occasions publicly, privately, and at Commission meetings concerns about our use of goals and timetables. I have actively supported Commission policy in spite of my concerns. Without a policy review by the Commission, I believe that it is imprudent for me to oppose Commission policy.

Mr. HAWKINS. You are not stating Commission policy? I am asking you, as an individual, if you want to disassociate yourself from the views of the Commission in 1983, were those your views? Now we are being told now those were your views in 1983.

Mr. THOMAS. Those were not my views in 1983.

Mr. HAWKINS. I am asking you whether are they still your views or have they changed?

Mr. THOMAS. I did not say they were my views in 1983.

Mr. HAWKINS. Were they the views of the Commission?

Mr. THOMAS. They were and still are the views of the Commission.

Mr. HAWKINS. So you were stating not your views but those of the Commission. Do you still believe that to be the Commission's views today, as opposed to your own?

Mr. THOMAS. It definitely is the Commission's view today. The regulations are still in place, and if they are in place after we review the policy, I would write a similar letter to the Justice Department.

Mr. HAWKINS. You have indicated you think that should be changed. In what way would you change those views?

Mr. THOMAS. Without getting into all the details of Federal affirmative action plans which are, as you know, quite detailed, I believe that there is no way that we can determine the perfect work force representation, nor do I believe as a practical matter that the managers who implement these programs actually refer to the goals and timetables.

Mr. HAWKINS. Would you elaborate a little more? Do you support or oppose the use of goals and timetables?

Mr. THOMAS. I do not support the use of goals and timetables. I do not think, as a practical matter, that they work, nor do I believe that we can in any way determine what is the perfect work force representation for any group at any time.

Mr. HAWKINS. All right. It is clear to us what your position is now. How would you change that? What do you offer as a substitute for that approach which has historically been used and which is supported by the Congress and the courts?

You now suggest that you have views which differ from the Congress, from the Courts and from the Civil Rights Act of 1964 as amended. What is your particular view now? What do you offer as a substitute for that approach?

Mr. THOMAS. Well, first of all, I have not found reference to goals and timetables in the Civil Rights Act of 1964. My view, with respect to——

Mr. HAWKINS. They were approved in 1972, certainly clarified and certainly approved in the 1972 legislation, so let's not obfuscate that particular point.

Mr. THOMAS. I am not going to quibble with that; however, I still maintain that I don't find reference to it.

With respect to the pragmatic side, which is more important to me than any, I cannot find in our use of goals and timetables and those plans that they actually work within the Federal work force.

I believe that it would be much, much more appropriate for us to continue to track the work force representation in the agencies, which we do and which are not objectionable, and that we become more aggressive in reporting such findings and such lack of progress, if there is a lack of progress, and the equal employment opportunity concerns that we might have with a particular agency to oversight committees and appropriation committees. I think that that would be much, much more effective than just simply getting reams of paper back from agencies each year without any enforcement clout.

Mr. HAWKINS. How would you change the enforcement process?

Mr. THOMAS. There isn't an enforcement process in Federal affirmative action. There is nothing that we can do beyond collecting data at this time.

Mr. HAWKINS. How would you know that progress is being made since you have already indicated certainly publicly that you don't rely upon numerical goals?

Mr. THOMAS. I think we could compare this year's data against last year's data and determine whether or not progress has been made.

Mr. HAWKINS. How would you determine progress? We are not suggesting that you are necessarily correct in criticizing the present method, but yet you wish to change it in some particular way. You say you would change that in some pragmatic approach. What pragmatic approach would you use in the enforcement field? How would you be sure that that progress would be made, and how would you measure the progress?

Mr. THOMAS. I am indicating to you, Mr. Chairman, as someone who has to collect the data, that the data that we receive does not in any way indicate with respect to goals and timetables any progress, that the progress is made as a result of the commitment of the management to equal employment opportunity or the inclusion of minorities and women in the work force.

I think, personally, that is better achieved by working closely with the various oversight committees and the appropriations committees in that process, rather than to have managers project out in the future in some imagined way what the representation of these groups should be in their work force.

Mr. HAWKINS. Well, now, you are talking strictly about the Federal sector. You are not making your remarks relevant to the private sector. Would you say that all that you have said with respect to the Federal sector applies equally to the private sector as well?

Mr. THOMAS. Well, first of all, we do not have the kind of Federal affirmative action program in the private sector as we have in the Federal sector. However, we do have an ability in court orders, et cetera, I believe to remedy the violations involved in a broad way.

We also have an opportunity to restore that particular individual who has been discriminated against to the position that they should be in, to remedy their concerns, and I think to require changes with respect to those individuals in the employer's work force. That could include a broadening of remedies. I don't think that we are as limited as we are in the Federal affirmative action area, and I might add that one of the things that we are doing at the Commission is exploring new remedies in the area of equal employment opportunity in the private sector.

Mr. HAWKINS. Let's go to the private sector with another case. Commenting on a case which was filed by the EEOC against Sears, you are reported to have said, and I quote you, "The case relies almost exclusively on statistics." In that statement you appear to be criticizing EEOC on its own case.

Do you think that it is appropriate for you, as Chairman of the Commission, or for the other Commissioners, to be criticizing the Commission's own case while the case is still before the Court?

Mr. THOMAS. First of all, I did not say that the *Sears* case was not a winable case or a defensible case. I simply indicated that it was a case that relies exclusively on statistics.

I, personally, have problems with cases that rely exclusively on statistics. The Commission has approved many cases, not many, but a number of cases, during my tenure which rely either exclusively or almost exclusively on statistics.

Mr. HAWKINS. An opinion of the ninth circuit court, and I quote, says:

> Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are societal and so accepted that they defy proof other than by statistics and in *Weber*, the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice.

That was said in the *Weber* case. Do you agree or disagree with that opinion when you relate your disbelief in the use of statistics as being at least one of the methods you would rely on, whether a discrimination actually exists and specifically the *Sears* case that you proposed yourself and now your very statements are being used by the opposition to rely on in their case. Do you think that is appropriate, or do you agree or disagree with the opinion of the courts as expressed in the *Weber* case pertaining to statistics?

Mr. THOMAS. First of all, I don't think the notions of utility and exclusivity are mutually exclusive. I did not say that statistics were not useful. In my opinion at least, we should not rely solely on statistics to process cases. That was my opinion, and that continues to be my opinion

I don't believe the Ninth Circuit case disagrees with that. It points out the usefulness of statistics. I agree 100 percent with that. I have simply pointed out in Commission meetings on numerous occasions that you can misuse statistics, or you can properly use statistics.

In fact, one of the efforts that we have made at EEOC is to begin, and it is again very well accepted at the Commission, teaching statistics to our investigators so they will know the proper use of statistics. I do not believe that every statistical disparity between racial or ethnic or sex representation in work forces results from discrimination. I think that those statistics can be misused, and we should use statistics, but use them in the appropriate way.

Mr. HAWKINS. Do you intend to pursue that within the confines of the agency? At one of the previous hearings, you said that you were developing a system that would relate to utilization of the work force and at least indicated that statistical information would be a basic part of this utilization. Have you proceeded to do so? Have you developed a position on a regulation that pertains to this subject which you promised some time ago?

Mr. THOMAS. I am missing your question, Mr. Chairman. I don't understand your question.

Mr. HAWKINS. Well, I don't think we understand each other very well. Some time ago you said you were developing a statistical analysis of the work force and would deal with the utilization process method of determining where difficulties or disparities might prevail.

Now, in what way have you followed up on that subject, if at all?

Mr. THOMAS. Well, it sounds that we are talking about two different things. One, we have developed a study, and we have been working on a study, and it is in galley form now, analyzing the work force in the year 2000. Of course, those are projected. That is separate and apart from our regulatory process.

Second, the notion of underutilization and underrepresentation are two concepts that when we look at the Federal affirmative action regulations, as well as UGESP, we will be looking at. These are two different things. The project 2000 study that we were doing, again, that is more in the nature of research, and it is something that I think is important.

In fact, this afternoon we will have an opportunity to listen to Dr. Andrew Brimmer, who has done a similar analysis of a futuristic sort with respect to the work force and some of the causes and reasons why minorities and women will either rise in representation or fall out of the work force. So the initial part of that with respect to the analysis of the work force in the year 2000 is for our benefit and for our own education and to give us some idea of where we are going. Underutilization and underrepresentation are concepts within the Federal affirmative action area that we will be looking at in our regulatory review process.

Mr. HAWKINS. I don't think you understood the question. I will return to it.

Let me yield at this time, and we will return to that in a more specific way. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman, and Mr. Thomas.

I would like to begin with a very general question. I think that credibility is so essential among people in Government, among Government programs and Government agencies. There seems to be some dispute over the overall direction that EEOC is going by some minority groups or advocacies for these groups.

Do you believe that this is a problem that can be solved through improved communication and public relations with these organizations, or do you believe that there is a significant philosophical difference between perhaps the direction that the Commission is taking at the present time and some of these organizations?

Mr. THOMAS. Well, that is a good question. What we have concentrated on over the past 2½ years is the credibility with respect to EEOC as an institution. As you probably know, we have attempted to maintain a fairly low profile in a lot of debates which, in my opinion, were counterproductive about such issues as quotas, affirmative action, et cetera, and attempted to just do our job, and we think that in spite of the debates, the people at the agency have done a good job.

One of the things that we have accepted just as a part of doing business and the job itself is criticism. We certainly get our share. It may be said that we don't get enough money or enough positive attention, but we certainly get enough criticism to last three or four lifetimes. So that is just a part of the ball game.

We have some fundamental disagreements, and there is fundamental disagreement in the public, as to what the whole notion of civil rights means, what equal employment opportunity means. Some people think that equal employment opportunity simply means make the game fair, don't treat a person adversely because of race, sex, whatever, or preferentially because of race or sex. Those should be neutral. Others feel that race, sex, national origin should be a part of the consideration, and in some instances preferential. There is a fundamental disagreement there.

There is also a disagreement over the appropriate use of the whole notion of proportional representation in the affirmative action and the equal employment opportunity area. I think that those disagreements will persist. We have attempted to continue to operate in spite of those disagreements.

We have also attempted to deal with those differences as a bipartisan, pluralistic Commission. We believe that we have an obligation to do that.

The concern that I have now with respect to the criticisms, it seems as if they are saying, one, we should not have a differing point of view; and, two, we have no right to review something that was put in place by them. I have basic problems with that since we have been put in the position of running the agency and setting the policy of the agency. So I think that those differences will always result in criticisms, but they should not necessarily result in diminished credibility.

However, when hyperbole is involved in the criticisms, it can only result in reduced credibility.

Mr. GUNDERSON. Mr. Chairman, we had an oversight hearing about 1 year ago in subcommittee which you attended. In that particular oversight hearing, Professor Hill from Wisconsin testified to his belief that the conciliation process was a failure due to the lack of followup or a lack of any coordination between the conciliation and the litigation process within EEOC.

How would you respond to that charge, and have any steps been taken in the past year to perhaps remedy that perception?

Mr. THOMAS. I think that I have had occasion to speak to Dr. Hill a number of times. The major difference at the Commission now—I have been there 2½ years—is that we have people who cooperate. Before, there were tremendous tensions.

I just visited yesterday, and the day before, our regional meetings of our district directors, our regional attorneys, and our area directors in New Orleans and in Jackson, MS. The attitude is totally different from what it was a year or so ago, where there was divisiveness. Those two processes, the compliance side and the legal side, the enforcement side must work together.

We have attempted over the past 2½ years to foster teamwork. Litigation and compliance are two naturally divergent approaches—the compliance side to try to settle the cases out. That is built in the statute. The legal side, once conciliation fails, has to go on, and to litigate the cases. Balancing compliance and litigation is something that is very delicate. It requires cooperation.

We believe now that our acting general counsel, who has been at the Commission for many years and who knows both processes and was a former district director as well as one of our leading litigators, can pull those two together. We also have a commission that is not divisive. I think that is important to understand.

Although we, as commissioners, may disagree on policy issues, we are pulling in the same direction. So we think that we have, for the most part, resolved the basic conflicts between compliance and the litigation effort.

Mr. GUNDERSON. Let's talk about training for a second. You mentioned training in your opening remarks. You also mentioned the need to rebuild the infrastructure of your agency.

A year ago, two individuals representing EEOC employees did not respond in any detailed way to the initiatives you suggested at that time to improve training, stating that there had simply been insufficient time passed to evaluate those efforts. Could you elaborate on what you think the success has been of your training efforts since that time?

Mr. THOMAS. The training, in my opinion, has been structured. It is something that we took a lot of time in developing. It is something that we have preserved even in difficult budgetary situations. We have spent five times as much money in fiscal year 1984 as we did in fiscal year 1982 on training. We have attempted to operate on a shoestring budget—that is to spend more time actually training than traveling, for example. We have attempted to have steady training, as opposed to simply one-shot training. We have attempted to train clericals as well as top-level managers.

We are beginning to see the results. We have trained people in use of word processors, display writers. We have trained people in the use of new IBM personal computers. We have trained people in statistics, trial advocacy, writing skills, typing skills, et cetera, and we are seeing the results; and over the next few years, we will see even greater results.

Mr. GUNDERSON. How about training in consistency of philosophy? You mentioned, I think, in your statement that you are trying to make sure that people below the Commission carry out the wish of the Commission. Is there any improvement in that area?

Mr. THOMAS. One of the problems that we had was communications. We think that by having meetings such as those we just had at Jackson and New Orleans, the meeting that we had of all of our managers in October in San Antonio, the Commissioners getting out in the field, talking to the people, development of our compliance manual, which has been in a constant state of being written and rewritten over the past 2 years, reviewing our regulations, and being honest about the review and getting career people involved, communicates to Commission staff what we are trying to do.

We also think it is really important, and something that should not be missed, is that we are getting back to full investigations where people actually go out to look at cases. This is a very expensive process and something that we have to look at down the road but we are moving away from just looking at papers and calling people together and trying to force them to settle the charges. We want to fully investigate the charge and resolve discrimination problems or concerns.

Commissioner Alvarez spent his first 2 months or so in a field office before he came to the agency. We all propose to do something similar to that over the next year or so; to make sure that we know what the concerns of the people in the field actually are, the intake officers, the people in rapid charge, the people in extended investigations units, et cetera.

We think that that will be important for us to know our field offices side of things. We so often tend to have this top-down approach to policy—to shove it down their throats—so to speak. We would like to go out to the field and see what we proposed looks to them. We are doing that at the management level now. We will be doing that at different levels in the future.

The other thing that—again I don't want to spend too much time on it, but it is something that I will be heading up personally—is our program in quality assurance. It is a program that the Japanese use but actually was developed in the United States, where you actually get the people to determine what they think their job is or how they think it should be done, or what the quality components of their job are.

We think that such a program promotes the kind of communication necessary to do the job in an appropriate way and in a quality way. So, we are trying to set a tone at the Commission level of cooperation, and hopefully, it will filter down. And, hopefully, the efforts that we make of getting into the field and not just staying on the fifth floor of our agency will also aid in the communication.

More programmatically, we have training programs to teach our people across the board what the policies of the Commission are. In the past, people were isolated in the various areas. They either did only Equal Pay Act cases, or only age cases, or they did only title VII cases. We are trying to train them across the board. We have conducted such training in the past as a part of our reorganization, and we will continue to conduct that type of training in the future.

We have worked on the whole service delivery system, as well as the supporting structure, the infrastructure of the agency, over the past 2½ years. That will continue notwithstanding the policy changes which the agency may or may not make. We think that we have made a tremendous amount of progress, but we still have a long way to go.

Mr. GUNDERSON. You have mentioned in some earlier remarks that you have a shoestring budget, and you said in your opening statement that we have not one slot to spare. Do you have an adequate budget to deal with the issue of discrimination?

Mr. **Thomas**. I don't think that any budget is ever adequate to deal with the issue of discrimination. I have never been of the school that discrimination or racism has ever disappeared, or diminished, or anything like that. I think that what we can do is recognize reality and recognize what is going to be available to us and try to do the best job that we can with it.

We propose budgets each year. In the past 3 years, we proposed what we thought, considering all the realities, would be adequate to run our agency. We thought that we had an obligation to use that money wisely. We have, unfortunately, suffered some reductions of those requests on the Hill, but we think that we have enough to deliver the service at this time.

We are all under significant pressures this year from a budgetary standpoint, but we are confident that, as we have done in the past, we can weather those storms.

Mr. **Gunderson**. One of the discussion points about your initiatives, and the direction that the EEOC appears to be moving, involves victim-specific remedies. There has been a suggestion by some that this may require specific legislative change to accommodate such a new direction.

Is that your opinion?

Mr. **Thomas**. I think after the *Stotts* decision, where the courts did direct attention to that, that the focus of our remedial approach would have to be more victim specific.

Mr. **Gunderson**. You think it would have to be?

Mr. **Thomas**. Yes.

Mr. **Gunderson**. It would require legislative change?

Mr. **Thomas**. I think since that was statutory construction, it would, yes, or another Supreme Court decision.

Mr. **Gunderson**. We are going to be told in some future testimony this morning that title VII provides only a limited monetary remedy. A victim may receive only a payback award for a limited 2-year period and title VII precludes compensatory and punitive damages.

In your opinion, would this be an appropriate subject for modification under the theory of more victim specific remedies?

Mr. **Thomas**. I think that any effort to strengthen the enforcement provisions of title VII, as well as clean up the administrative burdens placed on charging parties, would be welcome. I have said this time and again—again something that goes unreported—that the remedies under title VII are feeble at best. Discrimination should merit a lot more than just being paid what you have been paid had you gotten the job.

Mr. **Gunderson**. One of the other areas where you are talking about some type of change is in the whole area of the testing guidelines in the effort to reevaluate them and to make them easier to understand and to be used by industry. Do you think the documentation and the recordkeeping for employers will be simplified under this process? Do you think it will allow for better utilization of testing, or is it, in essence, placing a lower priority on the concept of testing?

Mr. **Thomas**. One of the first areas that we voted to review under the uniform guidelines were the recordkeeping provisions. We have not completed that review, but we were reviewing it as we review all of our regulations for the sole purpose of determining whether or not we can do our jobs better with a new set of requirements.

I can't speak for the Commission at this point, but I think that we could do a better job, not only in recordkeeping, but with respect to our data analysis and the two together would certainly result in better enforcement policy.

Mr. Gunderson. My final question would be to ask what efforts have been made by the Commission in consulting with outside agencies and outside associations to review the testing guidelines? I am sure you are aware that groups such as the American Psychological Association have raised some concerns about what they perceive to be the direction that the agency is going.

Have you consulted with groups like this, with other associations and with other outside agencies in trying to develop new directions?

Mr. Thomas. They didn't wait on consultation, as you probably know. I was under significant pressure when I first came to EEOC in 1982 to immediately make the uniform guidelines a top priority. I refused to do that and the Commission refused to go beyond designating for review the recordkeeping portions of the guidelines. I think that that was a wise and prudent decision.

The American Psychological Association has had concerns about the guidelines and expressed those concerns, I [illegible] beginning in 1981. It was recommended by many that we await their findings. Well, we have been waiting for quite some time. However, we think that the Commission as a body should make the decision, not the American Psychological Association, and hence we are moving along with our review.

Now, in that review we will consult everyone. We will get the opinions of everyone as we normally do and as required by the regulatory process. We will also coordinate it within the Government; and we will also, I am sure, be subject to even more hearings and inquiries from the legislative branch of Government concerning any proposal.

So I think there will be more than adequate input concerning any proposed changes or any areas that might be in any way altered through the regulatory process. I might add also that the Commission is by no stretch of the imagination in lock step on this issue or any other issue. So there will be, again, opportunity for diverse views and discussion of diverse views, inclusion of diverse opinions, and ultimately the decision will be a product of that kind of input.

Mr. Gunderson. In closing, I just want to say that I think there can always be a legitimate debate on the proper method used to eliminate discrimination. I doubt there can be much debate about the improvement and professionalism of EEOC under your leadership, and I want to compliment you for that.

Mr. Thomas. Thank you.

Mr. Gunderson. Thank you, Mr. Chairman.

Mr. Hawkins. Mr. Williams.

Mr. Williams. Thank you, Mr. Chairman.

Chairman Thomas, earlier in one of your responses to a question asked by Mr. Hawkins, you said that there is misuse of statistics and the proper use of statistics. With regard to findings and enforcement of the law under title VII, is it your judgment that the tradition of those findings and enforcement have been primarily the proper or improper use of statistics in the past?

Mr. THOMAS. I don't think you can generalize that way. I think it depends on the specific case. We have a lot of statistical cases at EEOC, and in many instances I vote for them. In some instances, I don't. I think when you have hard and fast adherence to the notion that every statistical disparity between racial or ethnic groups or along sexual lines results from discrimination, I think you are prone, or apt, to misuse statistics.

Mr. WILLIAMS. Has the Commission in the past, or have the courts in each instance, always relied on statistics for their findings or requirements of enforcement? Have they always leaned toward this misuse of statistics?

Mr. THOMAS. No, I can't say that. Administratively, again, it depends on selected cases.

Mr. WILLIAMS. Have they done it in enough selected cases to encourage your concern? I am trying to determine the root of your concern here.

Mr. THOMAS. I think my concerns are primarily with our agency administratively. I think that we have misused statistics in enough instances to raise my concerns.

Mr. WILLIAMS. It is my understanding, and I speak not as an attorney, that the finding of statistical disparities establish a prima facie case and that is so important because the burden shifts to an employer. So, therefore, do we not, under the laws as they currently are, do we not need to continue to try to determine statistical disparities?

Mr. THOMAS. I do not disagree with that, but when you get in a situation where you make the assumption that, as an enforcement agency, that every statistical disparity is discrimination, I think that you are taking a wrong step. I am not saying you should not have statistical disparities. I am not saying that you should not use statistics. I am not saying that statistics are inappropriate. But every statistical disparity is not discrimination.

Mr. WILLIAMS. I have been caught by your use of the Georgetown basketball team as an example of the futility of trying to use the notion of statistical disparities. I don't know whether that is a good example from which to try to proceed logically, but let's use it inasmuch as you use it.

What abilities does a basketball player need to be chosen by the coach to make the team?

Mr. THOMAS. Well, let's go back a second. I think that you could conclude from the results statistically, that you have to be black, or you could conclude, if you did not use race, that you had to play basketball.

Now, what does that mean? That means a whole range of things. You obviously have to be taller than 5 feet 8. You probably have to be aggressive on defense in Thompson's system. You probably have to be disciplined and a good student, et cetera, because even some good basketball players could not play for him, so there are a whole range of considerations other than race.

But if you just looked at the clear statistical disparity between the student body at Georgetown and the basketball team, you could conclude, or some could conclude, without more, that you have to be black to play for a black coach.

Mr. **Williams**. Now, given the fact that you recognize that any prudent coach would consider those abilities which you mentioned plus others, is that not what a commission trying to determine whether or not Coach Thompson was guilty of bias, or a court trying to determine whether or not racism was involved in the choosing of that team, is that not what they would find? No, it wasn't race. In fact, this fellow can jump 5 feet high, and this fellow can only jump 3 feet high, so we picked this one He happened to be black. Does any court in the country call that racism under title VII?

Mr. **Thomas**. In our Commission, that is precisely the kind of determination that we are trying to make. That is precisely the difference between what we consider misuse and proper use of statistics, that we go behind the statistics and ask some of those questions.

Mr. **Williams**. As findings historically have been pursued, have those questions in the past not been asked and used in the determination of whether or not the coach of the Georgetown team was guilty of bias?

Mr. **Thomas**. In some cases, I must admit that administratively we have not asked those questions, and those are the kinds of questions we have been asking over the past 2 years.

Why? Are there any nonrace or legitimate reasons why this happens this way? That is all we are trying to make sense out of the numbers.

Mr. **Williams**. It seems to me that a number of American citizens are confused because they believe that the Government would find under the law, they tend to think that their Government finds that because all the players of the Georgetown basketball team are black; therefore, Georgetown might be guilty of racism. Well, that is nowhere in the law. The Congress never intended that. The law has never intended that, and yet you use that as an example for significant change. I don't understand it.

Mr. **Thomas**. No, we use that as an example of a starting point, to indicate the proper use of statistics versus a misuse of statistics. We have situations where people take any statistical disparity and automatically assume from that, because of the breakout in race, that there is discrimination.

We think, as you used in your example, we have an obligation to go behind those numbers and to make sense out of those numbers, that every statistical disparity does not automatically yield discrimination. Just as Coach Thompson may not be discriminating, again others may not be discriminating.

Now, I am not saying that will make it any easier or it cuts both ways. Someone may have a great representation of minorities on their work force; but we can go behind that number and find discrimination, as the court found in Teal that the bottom line simply did not protect or insulate the employer from discriminatory conduct.

Mr. **Hawkins**. If the gentleman would yield before you leave that area.

Mr. Thomas keeps referring to people who abuse the statistics. Whom are you referring to, your staff, or who? Are you saying people on your staff sometimes look at the pure raw data and conclude that there is discrimination or some reasonable cause to believe there is discrimination? Who are these people that you are referring to?

Mr. THOMAS. Mr. Chairman, I indicated in my opening remarks that as a result of our obligations as commissioners and our collective experiences at the Equal Employment Opportunity Commission, we voted to review the Uniform Guidelines and some of our practices. That experience indicates to us that there are enough automatic assumptions based on disparities in statistics that we should review our staff's actions and our own assumptions.

Mr. HAWKINS. Are you saying you have people on your staff at the Commission who review the cases who have determined that there is discrimination merely on the basis of such disparities revealed by statistics? Is that what you are saying?

Mr. THOMAS. That is true.

Mr. HAWKINS. Well, even assuming it is true, and I understand you are training your employees, but let's say you haven't succeeded in training them and they are doing this, this is not a finding of guilt, obviously. This is a way to get into litigation, isn't it? Isn't this a way to have access to a company's records or to ask the football coach on what basis did he select the members of his team? What other way are you going to do it in most instances unless there is some suspicion that something might be wrong?

You look at the records. You determine that the statistics were abused, and you dismiss the case. That is the consequence of it. What harm is done if you inspect the raw data? It is not conclusive. It certainly can be rebutted by the respondent company. I don't know what other way you are suggesting that all of the statistical information that you get, the EEO-1's and so forth, should not be used to prove discrimination.

You could sit in your office and look at the EEO-1 reports and determine that there may be some suspicious violations by some of the larger companies and conclude from that that it is worth an investigation. Certainly, if you find that investigation doesn't lead anywhere, I mean if some staff member has abused the investigation in some way, you dismiss the case. What is wrong with that?

I just don't understand what you are suggesting as an alternative. Are you suggesting that statistical information should not be used?

Mr. THOMAS. First of all we do have an option of dismissing cases sometimes. Sometimes, obviously, we don't. I have, personally signed commissioners' charges based primarily on statistics. We all review cases based primarily on statistics. I think we have an obligation before we sign cases, commissioners' charges, before we investigate cases, before we litigate cases, to make sure that they make sense. I don't think we should be in the business of doing nonsensical things.

Mr. HAWKINS. No one is suggesting that, and I agree with what you are saying now, but you still don't answer the question.

Mr. THOMAS. I didn't say there was anything wrong with it.

Mr. **Hawkins**. You are going to look at the statistics and use that at least as a basis of determining whether or not further litigation or dismissal or some reason may be there to process the case, but you seem to be suggesting that somebody some place is over-relying on this method, and that it is wrong?

Mr. **Thomas**. I think it is wrong to assume automatically that every disparity between race——

Mr. **Hawkins**. Well, who is doing that? We are not suggesting that that is right. We are suggesting who is it that is doing that? Is your agency doing it or who is it that you are suggesting is over-relying on it, as you have stated to the press? I don't know what you are talking about when you say, as you did in the *Griggs* case, in saying that that was overturned by a later decision and that it was changed, and the only thing you come up with is the *Stotts* decision.

But, beyond that, you have said that you get people now saying if you don't have a certain number of minorities or women on the job that you are guilty of discrimination. What people are saying that?

Mr. **Thomas**. We get it from this body. We get it from the courts. We get it from the public. We get it from the media. There is a tendency——

Mr. **Hawkins**. Well, you are not responding to it, obviously.

Mr. **Thomas**. Going back to our own guidelines, I have said time and again, and it seems as if we are talking around the point, that our own people, in the use of our own administrative guidelines and presentation of cases to our Commission, make the same kinds of mistakes. That is that every statistical disparity is discrimination.

Now, we do act as a sorting out process. We do act as the body ultimately, when a case goes to litigation, that determines whether or not those statistics are appropriate, but we don't always make those decisions. Some of the decisions of this agency are made at the administrative level. Some of the decisions elsewhere are made beyond our control. We are simply saying that we have an obligation to make sure that the use of statistics in our agency, whether or not we have the ultimate option of vetoing those decisions, is appropriate.

Mr. **Hawkins**. Can you cite one case in which the wrong use of statistics by anyone in your department has resulted in a cause of action?

Mr. **Thomas**. IBM in Baltimore. We got blown out of the water on it.

Mr. **Hawkins**. Well, it could be very inferior litigation.

Mr. **Thomas**. I think that I would ask the chairman——

Mr. **Hawkins**. That is one case. Can you cite another case? Do you consider your statement with respect to Sears, and I think it is very inappropriate to be discussing Sears because it is still in court, but you publicly have done so and you said there is an overreliance on statistics in that case. Is that the only basis on which you are in court with Sears, and do you dismiss the case already as being a poor case and in a sense dismissing your own case? Do you intend to testify in Sears' behalf? You may be subpoenaed to do so.

Mr. **Thomas**. Mr. Chairman, we have spent over $2 million in the last couple of years on experts or analyzing statistics in Sears. Obviously, we have made one incredible commitment of resources in that case that dwarfs any other expenditure in the Commission on enforcement. So the commitment to fighting Sears is there. We have had to make it at the expense of a lot of other things, and we are in a position, perhaps, to expend considerably more on that particular case.

Our problem inside our agency is that often times when the staff relies on statistics, they then stop investigating the cases. Also it has to be remembered that these cases are often dealt with below the Commission level.

Now, we have in a number of instances had difficulty in court when we had cases based on what was considered ultimately an inappropriate reliance on statistics.

Mr. WILLIAMS. Mr. Chairman, if I may reclaim my time?

Mr. HAWKINS. Yes; you may take my time out of yours.

Mr. WILLIAMS. Chairman Thomas, in the past, you have worked for and debated on this item of important civil rights principles.

Mr. THOMAS. I have not debated anybody.

Mr. WILLIAMS. You have debated for important civil rights principles. You have been a defender of the great tradition of civil rights in the past quarter of a century in this country, and I applaud you for that. I think the members of this panel are simply saying that one of those principles may well be this process by which we sort out where discrimination is in this country.

One of those processes is through the use of statistical evidence. There are only several ways to find fire. One is to be burned by it and the other way is to look for the smoke. There are many people being burned in the past in America, as you know perhaps better than I, and the Congress and many of the supporters of efforts to establish the American tradition of civil rights have simply said that the use of statistics is a way to find the fire before we are burned, and we just encourage you to continue to use that as a tool.

Mr. THOMAS. We, again, going back to what I said, have not indicated that we will not use statistics. To use your analogy, not all smoke has a fire.

Mr. WILLIAMS. That is right.

Mr. THOMAS. Now what I am trying to say to you about the misuse of statistics is that just like any good tool, that tool can be, and often is, misused. I have said time and again since I have been at the agency that all statistical disparities are not the result of discrimination.

But I continue to resent, both privately and publicly, the sense that everyone who tends to disagree with a particular notion is anticivil rights or not interested in equal employment opportunity itself. Well, I am still old enough to remember when counting by race was detrimental, and I try to do it very carefully.

Mr. WILLIAMS. Mr. Thomas, inasmuch as you insist that there has been perhaps significant misuse of statistics by the Commission, I would appreciate it if you would send this committee a letter indicating to us where you think the bulk of that misuse has been, and if you can provide some detail to us so that we better understand your rationale?

Mr. THOMAS. Well, we can take an opportunity to do that.

[The information follows.]

SUPPLEMENTAL STATEMENT OF CLARENCE THOMAS, CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AS REQUESTED, I AM PROVIDING THIS STATEMENT IDENTIFYING SEVERAL EXAMPLES OF WHERE, IN MY OPINION, THE COMMISSION HAS RELIED TOO HEAVILY ON STATISTICS DURING THE COURSE OF ITS INVESTIGATIONS. THESE ARE NOT NEW CONCERNS. I HAVE VOICED MY CONCERNS REGARDING THE DEARTH OF VICTIM SPECIFIC INFORMATION OBTAINED IN OUR INVESTIGATIONS ON COUNTLESS OCCASIONS, USUALLY TO THE STAFF IN THE CLOSED SESSION OF THE COMMISSION'S MEETINGS.

I REEMPHASIZE THAT I SUPPORT THE PROPER USE OF STATISTICS. THERE IS NO QUESTION THAT A PLAINTIFF IN A TITLE VII ACTION MAY ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION SOLELY THROUGH THE USE OF STATISTICS PROVIDED THAT THE STATISTICAL METHODOLOGY AND ANALYSIS ARE SUCH THAT THE EVIDENCE IS RELEVANT AND PROBATIVE. HOWEVER, "STATISTICS . . . LIKE ANY OTHER KIND OF EVIDENCE MAY BE REBUTTED. IN SHORT, THEIR USEFULNESS DEPENDS ON ALL OF THE SURROUNDING FACTS AND CIRCUMSTANCES". UNITED STATES v. HAZELWOOD SCHOOL DISTRICT, 433 U.S. 299 (1977) QUOTING INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. UNITED STATES, 431 U.S. 324, 340 (1977).

ALTHOUGH TITLE VII MAKES IT UNLAWFUL TO REVEAL CHARGE INFORMATION PRIOR TO THE INSTITUTION OF COURT PROCEEDINGS, WITHOUT DIVULGING THE IDENTITIES OF ANY COMMISSION CHARGES, I WILL PROVIDE YOU EXAMPLES OF TYPICAL SITUATIONS IN WHICH, I BELIEVE, THE COMMISSION DID NOT FULLY ADDRESS THE SURROUNDING FACTS AND CIRCUMSTANCES OF THE CHARGES UNDER CONSIDERATION.

ONE SITUATION WAS PRESENTED IN A PROPOSED SETTLEMENT PROPOSAL OF A COMMISSIONER'S CHARGE. THE OFFICE HAD UNCOVERED SIXTEEN THOUSAND APPLICATIONS FROM POTENTIAL CLAIMANTS IN ITS INVESTIGATION OF THE SEX AND RACE BASED CHARGE AGAINST THE RESPONDENT. NEVERTHELESS, THE RECOMMENDATION FOR SETTLEMENT WAS BASED SOLELY ON STATISTICS. THERE WAS NO OVERVIEW OF THE APPLICANT CLASS TO DETERMINE WHO SHOULD HAVE RECEIVED THE JOB, IF JOBS WERE INDEED AVAILABLE. THERE WAS NOT A SINGLE AFFIDAVIT FROM ANY CLAIMANT WHO BELIEVED HE OR SHE HAD BEEN DISCRIMINATED AGAINST. THERE WAS NO DISCUSSION OF AVAILABILITY.

ANOTHER EXAMPLE INVOLVED A RECOMMENDED DECISION FINDING DISCRIMINATION ON A 1980 COMMISSIONER'S CHARGE AGAINST A WRITING SERVICES FIRM. THE RECOMMENDED DECISION, WITH REGARD TO HIRING, WAS BASED PRIMARILY ON A FINDING THAT THE FIRM HIRED BLACKS AT ONE HALF THE SELECTION RATES FOR WHITES. THE INVESTIGATION REVEALED TWENTY BLACKS WHO HAD NOT BEEN HIRED THE PRESENTOR INDICATED THAT ALL TWENTY WOULD HAVE BEEN PLACED ABSENT DISCRIMINATION. YET THE DECISION DIDN'T SPECIFY THE PRACTICE INVOLVED OR WHO WAS DISCRIMINATING. WHEN YOU ARE TALKING ABOUT WRITERS, AS WE WERE IN THAT CASE, HOW DO YOU DETERMINE WHO IS THE BEST QUALIFIED?

IN ANOTHER CASE WHICH WAS BEFORE THE COMMISSION ON A REQUEST FOR LITIGATION AUTHORIZATION, THE RECOMMENDATION WAS BASED ON A COMPARISON

OF THE LABOR AVAILABILITY AND THE APPARENT LOW REPRESENTATION OF MINORITIES IN THE COMPANY'S WORKFORCE. THE THRUST OF THE PRESENTATION WAS THAT IT WAS INCONCEIVABLE THAT A CERTAIN PROFESSIONAL CATEGORY STILL DOESN'T HAVE ANY BLACKS TWENTY YEARS AFTER THE PASSAGE OF THE ACT. AS I INDICATED AT THE COMMISSION MEETING, I DON'T PRESUME THAT A NUMERICAL DISPARITY IS ALWAYS BECAUSE OF DISCRIMINATION. I BELIEVE THAT NUMBERS ALONE ARE OFTEN INSUFFICIENT TO ESTABLISH DISCRIMINATION. WE NEED TO BE CONSIDERING WHO ACTUALLY APPLIED, THEIR QUALIFICATIONS, AND WHO WAS REJECTED AND THE NUMBER OF VACANCIES DURING THE PERIOD IN QUESTION.

IN STILL ANOTHER COMMISSIONER'S CHARGE DECISION RECOMMENDATION, THE RECOMMENDATION WAS PREMISED ON A LITERAL APPLICATION OF THE FISHER EXACT TEST. THERE WAS NO ANEDOCTAL EVIDENCE, DESPITE THE FACT THAT THE EMPLOYER EMPLOYS OVER 1,500 EMPLOYEES IN THE SAME LOCALITY AND THE CHARGE DATES BACK TO 1979.

STILL ANOTHER EXAMPLE INVOLVED A PROPOSED DECISION IN A NOVEL AREA, NAMELY AN ADVERSE IMPACT ANALYSIS UNDER THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (UGESP). THE CHARGE INVOLVES THE USE OF A WRITTEN TEST TO RANK ELIGIBLE APPLICANTS FOR PROMOTION AND ITS ALLEGED ADVERSE IMPACT ON BLACK APPLICANTS. STRICTLY SPEAKING, A CAUSE FINDING ON AN ADVERSE IMPACT BASIS WOULD BE WARRANTED UNDER UGESP SINCE THE STATISTICS INVOLVED PRODUCED A SELECTION IMPACT RATIO OF 64.1%, i.e. BELOW 80%. HOWEVER, THIS IGNORES THE FACT THAT THE IMPACT RATIO FOR BLACKS IS BASED ON A VERY SMALL NUMBER OF

BLACK PROMOTIONS, i. e., 3. HAD ONLY ONE MORE BLACK AND ONE LESS WHITE BEEN PROMOTED, THE IMPACT RATIO WOULD HAVE BEEN 87.1%, RATHER THAN 64.1% UNDER THE 80% RULE. WITH THE PROMOTION OF ONE MORE BLACK, THE COMMISSION WOULD HAVE FOUND NO CAUSE. IT DOESN'T MAKE SENSE TO ME TO BASE A FINDING OF REASONABLE CAUSE ON FACTS SUCH AS THESE.

I HAVE APPROVED MANY SETTLEMENTS AND RECOMMENDATIONS FOR LITIGATION WHICH WERE SUPPORTED BY THE STATISTICAL EVIDENCE. I THOUGHT THE BURLINGTON NORTHERN SETTLEMENT, WHICH PROVIDED FOR FULL MAKE WHOLE RELIEF, WAS AN EXCELLENT SETTLEMENT BASED ON A COMPLETE RECORD.

THE COURTS HAVE TAKEN A SIMILAR APPROACH. THE FIFTH CIRCUIT IN POUNCY v. PRUDENTIAL INSURANCE CO., 668 F.2d 795 (1982), WARNED AGAINST "THOSE WHO WOULD ENTER THE COURTHOUSE ARMED WITH STATISTICS THAT PROVED LITTLE MORE THAN THE LITIGANT'S RESOURCEFULNESS AT MANIPULATING NUMBERS." IN POUNCY, THE COURT OF APPEALS FOUND THAT THE WAGE DISCREPANCIES COULD BE EXPLAINED BY ANY NUMBER OF NONDISCRIMINATORY FACTORS. HOWEVER, THESE NON-DISCRIMINATORY FACTORS, SUCH AS DIFFERENT JOB LEVELS, DIFFERENT SKILL LEVELS, PREVIOUS TRAINING AND EXPERIENCE, WERE NOT CONSIDERED IN THE STATISTICS OFFERED. AS A CONSEQUENCE, UNDER THE APPELLANT'S ANALYSIS, AN ATTORNEY HIRED AT A LEVEL 20 WITH A SALARY OF $20,000 WOULD BE COMPARED WITH A FILE CLERK OF A DIFFERENT RACE WITH A SALARY OF $6,500 WHO HAPPENED TO BE HIRED THE SAME YEAR. BY CONTRAST, THE COMMISSION PREVAILED IN EEOC V. BALL CORP, 26 FEP CASES 1701 (6th Cir. 1981), BY OFFERING TESTIMONY FROM THE FEMALE APPLICANTS WHO HAD BEEN ACTIVELY DISCOURAGED FROM APPLYING FOR EMPLOYMENT. THE "LIVE BODIES" WERE VIEWED AS THE

SUBSTANCE OF OUR CASE, THE STATISTICS AS MERELY ICING ON THE CAKE. THE FOURTH CIRCUIT IN EEOC v. UNITED VIRGINIA BANK/ SEABOARD NATIONAL, 21 FEP CASES 1405 (4th CIR. 1980) FOUND THAT THE COMMISSION HAD FAILED TO ESTABLISH ITS PRIMA FACIE CASE BY ITS RELIANCE ON STATISTICS SHOWING THAT THE BANK HIRED 12.4% OF WHITE JOB APPLICANTS, BUT ONLY 4.4% OF BLACK APPLICANTS.

IN SHORT, I BELIEVE THE COMMISSION'S INVESTIGATIONS WOULD BE ENHANCED IF THE VICTIMS OF DISCRIMINATION WERE MADE A MORE INTEGRAL PART OF THE COMMISSION'S INVESTIGATION. THE FOURTH CIRCUIT IN EEOC v. FEDERAL RESERVE BANK 30 FEP CASES 1137, 1155, n.35, SUMMARIZED ITS VIEWS ON THE ABUSE OF STATISTICS WITH THE FOLLOWING QUOTATION:

> "THIS LEADS THE COURT TO CONCLUDE THAT TOO MANY USE STATISTICS AS A DRUNK MAN USES A LAMPPOST - FOR SUPPORT, AND NOT ILLUMINATION."

I AGREE WITH THAT SENTIMENT.

Mr. THOMAS. I might add, however, that most of this will come out in our review of UGESP, and most of the things that we do catch are in the closed session of our agenda when we review specific cases.

Mr. WILLIAMS. Finally, many of us believe that one of the tools which has been used to uncover discrimination, which is to many people in this Nation almost invisible and difficult to uncover, but one of the tools has been systemic discrimination and the efforts against that.

You seem to have some sense that those efforts have also been misused. Would you detail some of that for me?

Mr. THOMAS. I don't think I have said anything to suggest that. Our biggest problem with systemic is how do we, with the limited resources that we have as an agency, fit that whole program in with compliance and litigation? We have to make sure that we use every penny wisely. I have said time and again that if we are to attack broad-scale discrimination, we are going to have to do it through the systemic process.

Mr. WILLIAMS. I am pleased to hear that. I haven't previously understood it. I had just drawn the conclusion from my understanding that you were encouraging victim-specific discrimination and the pursuit of that rather than the pursuit of systemic discrimination. Am I correct in that assumption?

Mr. THOMAS. I think that what we have attempted to do, in our systemic cases and what I have encouraged, is that we not only go in simply with the notion that all we are going to ever find through investigation are a bunch of numbers. I think that we start with the numbers. Again, we start with the smoke. And when we sign Commissioners' charges, we try to make sense out of the numbers, and I have signed off on Commissioners' charges that are based on numbers, but we go behind it to make sure that they make sense in the investigation.

We do, then, have the ability to go in, as Chairman Hawkins indicated, and look at the practices, subpoena documents, look at the documents in the company. I do not then expect our people to come back with the same numbers that they presented to me in the Commissioners' charge, and that is where we have the differences, in that process.

Do we just go in and have nothing but numbers, or do we come back with something more than numbers?

Mr. WILLIAMS. Do you have an adequate staff and resources to pursue victim-specific discrimination cases in a large manner?

Mr. THOMAS. The victim-specific cases are the ones that come in our door and the ones that we administer all the time. We administer 60,000 to 70,000 of those every year. We will know, I believe at the end of this fiscal year, whether or not our resources are adequate to deal with all of those in a timely manner.

The head of any agency, I think, would say that you could always use more money. The question is, on our budget, can we process those cases in a timely manner and have a significant impact in areas such as systemic discrimination and in the litigation area?

We have an ambitious goal of litigating all of the cases in which we find problems. We think that that is very ambitious, but what we are trying to do is say to people that, if you come to the Commission, we will not just investigate your case and then let you go, and tell you to go try it on your own, but rather we will attempt to pursue it to the end in your behalf.

Again, we realize that it is ambitious, but we will know again over the next year how well that works.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Mr. HAWKINS. Mr. Hayes.

Mr. HAYES. Mr. Chairman, as a member of this committee, my obvious objective is to seek certain knowledge as to sense of direction for this Commission and for the present and the future. I don't want to deal with what may be apparent philosophical differences, with approaches. I realize there are going to be other areas that will have to be necessarily examined for specific complaints as they develop resulting from budgetary constraints which may unfold, and as we prioritize the distribution of our tax dollars.

I don't mind saying that the current situation, at least from my viewpoint, reveals what I consider to be a diminishing number of job opportunities for our minority youth and our blacks and other minorities being displaced as a result of just sheer technological change. I think we are moving to the point where the Federal Government has to become more aggressive to direct attention to what I see as problems as they exist today.

We have people who are locked out of the job market, untrained and totally unprepared to fit into whatever existing jobs there are. My bottom line is how do you right a wrong? What are the approaches that we use? I don't think rhetorical answers are going to suffice.

I have three questions, and I guess there might be some redundancy involved in them because I agree with some of the things that my colleagues have said, particularly my chairman here, in terms of the questions they have asked. But the first question is, In the absence of goals or timetables, how do you measure change? I just don't know.

Second, Mr. Thomas, how do you identify systemic discrimination?

Three, once identified, how do you resolve systemic discrimination?

My fourth question, I guess, is does this Commission have the resources or is it anticipated that they will get the resources to keep a significantly increased litigation caseload afloat? Those are the four questions that I have.

Mr. THOMAS. First of all, with respect to your opening statement, I have said since I have been in the executive branch of Government that the next two to three decades will be devastating for minorities. I have attempted, again, to make myself clear on that. Again title VII is based on the principle that people have equal qualifications, and I think that we need to begin to pay some attention not only to continuing to keep the doors of opportunity open with title VII, but to look at the input side.

I think we are looking at something that is going to be devastating in the next two to three decades. That is why we were looking in the outyears, and that is why we are going to spend the afternoon listening to Dr. Brimmer at the EEOC. I think there is going to be technological displacement of minorities; and I think that is not going to be captured by title VII.

I think in the educational arena, based on what I saw when I was at the Department of Education, that the education of minorities in school systems today is nothing short of criminal.

With respect to measuring change, I have not, in any way, said that we should not measure change. We do it with our EEO-1 reportings. We do it when we go in and investigate companies to look at the change in their own work forces, et cetera.

I don't think that you necessarily need goals and time tables to measure change. We can compare prior year data with this year's data and see change. We continue to use statistics to develop systemic charges, and I am sure that that will continue in the future.

We are not talking about the use of statistics. We are talking about the appropriate use of statistics.

With respect to remedies in large cases, we think that there are a variety of ways to do that, particularly where it results in broad class actions that we have had in some cases, and we think that we can continue to push for the remedy to change selection systems, promotion systems, testing systems, as well as remedying the people who were injured, identifying classes, et cetera. We think we have done a pretty good job in the settlements that we have had and the cases that we have presented over the past 2½ years. We have very significant large-scale settlements in this area, and I think we will continue to have success.

In the resources area, as I said before, I think discrimination, racism, sexism, whatever in this country, continues, and I think as long as you have a multiracial, multiethnic society you are going to have these kinds of problems, and I don't think that any budget is too big to fight in a free society discrimination based on sex or race.

The budget that we have had, and I might add that we have had some problems in this body getting the budget that we propose, but the budget that we have proposed, considering reality, has been adequate to do the job that we thought we should do. As an administrator of an agency, I would always like the comfort of having a heck of a lot more than we do have, but we don't have that luxury. So we propose a realistic budget and think that if it gets approved as requested and in a timely manner that it would be adequate to develop our litigation program as well as our compliance program and systemic programs.

Mr. HAYES. Mr. Chairman, I have no further questions, just a closing comment.

I am glad to understand that the chairman of the Commission recognizes the severity of the problem which appears to be confronting our minority youth as we approach the future. And I hope the role of the Commission, the Equal Employment Opportunity Commission, is not relegated to that of being one of a meek lamb instead of a tiger with teeth.

Mr. WILLIAMS. Will the gentleman yield before returning his time?

Mr. HAYES. I will be glad to yield to my colleague.

Mr. WILLIAMS. I also serve on the House Budget Committee, and one of the responses that you made several times is reminiscent of what many heads of agencies say when they come before a budget committee, and that is, well, we could always ask for more money. Every agency could use more money, and they say that as if you only had to ask and the Congress would give it to you.

The hard fact is that the Congress has not in the past traditionally given every agency all of the money they requested. Particularly from this administration that notion and that expression that, we don't have enough money, but we could always use more money. As if to say that if you come to the Congress we believe that money is infinite and that you could get as much as you ask for, and that only the tight fistedness of this administration prevents you from doing that.

It is simply not rational. No administration downtown, whether it be Democrat or Republican, ever got all the money they wanted when they came up here. The difference is that this administration asks for far less than you need to do the job. That has been the difference. Other administrations have at least asked for about what they thought they needed to do the job, and usually they have gotten less than that.

The agency chiefs, the Cabinet officers from this administration with the exception of Caspar Weinberger, ask for far less than they need to do the job.

Mr. THOMAS. With all due respect, I prepare the budget for EEOC, and I ask for what I need.

Mr. HAWKINS. Mr. Thomas, in answer to Mr. Hayes pertaining to goals, it wasn't clear to me whether you said you supported goals and timetables or not?

Mr. THOMAS. I said I didn't.

Mr. HAWKINS. You do not?

Mr. THOMAS. That is right.

Mr. HAWKINS. Do you support affirmative action plans?

Mr. THOMAS. I don't necessarily agree that they should, or are, in all cases the essence of affirmative action plans.

Mr. HAWKINS. Well, you say affirmative actions plans do not set goals which may be achievable in a reasonable manner within a certain period of time?

Mr. THOMAS. The problem that I have is who is to say what is achievable?

Mr. HAWKINS. If you use good efforts in order to attempt to achieve your goals, how do you know you can do anything unless you attempt to do it? Goals are a management tool used by every major corporation in this country, and yet you are saying that in the field of employment opportunities that such goal setting is not supportable.

You did say that you would measure it on the basis of what progress you have made this year as compared to the previous year. So, in effect, you are doing it in a negative way. You are saying that you have made some progress over that year, and yet prospectively you would dismiss the idea, saying this year we expect to be someplace next year, and yet you are comparing it with the past rather than the future. What is the difference?

Mr. THOMAS. Mr. Chairman, we probably have a fundamental disagreement here.

Mr. HAWKINS. Well, you disagree with the courts. You disagree with title VII. You disagree with every opinion that has been rendered except for the one case which you have mentioned, so I don't know who it is you are in step with except possibly Justice Reinquist and his dissenting opinion in several of the cases which seem to be closer to the view that you have expressed. I think he picked up one other Justice who agreed with him. So at least you have that support and the very vocal minority, and yet you are talking about changing the policies of the current administration.

Mr. THOMAS. The review of the policies of EEOC will take into account the various cases that have been decided, the legal analysis as well as pratical considerations.

Mr. Hawkins. What has changed since *Griggs* which you would change? Do you rely on *Griggs*, or do you intend to change it in your novel way?

Mr. Thomas. We intend to review the Guidelines at EEOC in light of not only *Griggs*, but *Stotts* and all the other cases that have been decided. We do not undertake review with a firm ideological point of view to begin with. If that were the case, there would be no need to review the uniform guidelines. It would be simply implementing a set of ideologies.

Going back to my concerns about goals and timetables, I said before, and perhaps it is my own personal problem, I have concerns when you start counting by race in any society. That is my personal view. It has been my view most of my life, and it will continue to be my view.

Mr. Hawkins. Well, if your views ever become universal in this country, God help us, because it seems to me what you have said this morning is simply saying that you want to emasculate all of the progress that has been made in the last 50 years. Are you going to change the Supreme Court to agree with your point of view? Is title VII a dead letter as far as the manner in which you intend to administer it. I hope you do it, at least in conjunction with your commissioners and not by yourself.

Mr. Thomas. If I did not think that we were going to make a contribution to the enforcement of title VII, I would not take the grief that I take over my own personal views. I would not take the criticisms, nor would I spend the hours trying to run an agency that, in my opinion, was almost hopelessly embroiled in administrative problems.

Mr. Hawkins. Well, I am going to put you on notice today that this committee is going to have a series of hearings to parallel the activities of your agency. If there is any attempt to change the law in the manner in which you indicate, which is contrary to the judicial interpretation, we would obviously want to know about it from time to time.

I just think we should compare notes with each other from time to time and not let too much time go by before we have these oversight hearings. And I would hope that you and the other commissioners can report to us from time to time on what changes are being contemplated before they are discussed publicly as if they are in effect; and, therefore, I think they give the wrong impression to the public, that it is all right to go ahead and discriminate or that it is all right to do certain things, because the laws, as such, are being changed.

Mr. Gunderson. Mr. Chairman.

Mr. Hawkins. Yes, Mr. Gunderson.

Mr. Gunderson. I think it would be improper if I allowed the remarks of the chairman to go as if they reflect the views of this entire committee. I think when we use words such as emasculation of the civil rights effort of this Government, and we question the intent and good will of the chairman and other members of the Commission, we are making serious mistakes. I don't want that position to be interpreted by anybody as being reflective of all people in Congress.

When we are so entrenched in our methods in this Government that we are unwilling to even consider the proposals and initiatives or different methods to achieve the same goals, then, frankly, I think we as a government are in trouble. I want you to know that we welcome that review, but, Mr. Chairman, there are going to be a number of us in this subcommittee who are going to have an open mind as long as you have a commitment to the goals which I think you have.

Thank you.

Mr. Thomas. Thank you.

Mr. Hawkins. Well, certainly we are going to hear from both sides. That is pretty obvious. And time after time in Congress the views expressed by Mr. Thomas have been presented by various Members of Congress. Mr. Hatch, on the Senate side, has several proposals that conform precisely to the views expressed by Mr. Thomas. Mr. Walker on our side has time after time presented his views which are similar to Mr. Thomas's views as well. I respect their presenting it in that way, and that is the proper way to do it.

But the views of an individual such as Mr. Thomas, who admits that even his commissioners don't necessarily agree with him, expressing those views publicly, I think, is a dangerous thing and particularly when they are in conflict with the courts. If this committee or if the Congress wishes to support that, then I think it should be done by legislation to change the law. Certainly, we would have serious reason to believe that the whole history, and one only has to know his history to know that the 14th amendment came about because it was race conscious. It was specific. It was to help a group and all the other opinions that have been rendered have supported that contention, and yet we have those who obfuscated the law and emasculated it.

And if these views that have been expressed here this morning are going to be encouraged, then I say again it is going to emasculate our civil rights law enforcement activities. I suspect that is the purpose, to do away with title VII. But if we have to do away with title VII, we would have to do it through the legislative process. Let them introduce a bill, and then we can debate it and we can find out whether the Congress wishes to do away with it or not. But the demise of title VII cannot be done by bureaucrats who are not elected by anyone and whose views certainly are contrary to the Congress, to the courts, and I think the common sense.

Mr. Williams. Would the chairman yield to me?

Mr. Hawkins. Mr. Williams.

Mr. Williams. I would like to say, as a member of this side of the aisle and in response to my friend, Mr. Gunderson, that in his remarks I noted an indication of something that has just run through the Presidential campaigns, and that is one party in America is the party of the status quo, while the other party in America represented on Mr. Gunderson's side of the aisle is the party of movement and the party who wants to find better ways to do things.

I think that both of those are incorrect. But in defense of those of us in the majority of this House, let me say that it has been our party that for half a century has moved to try to find a creative and effective remedy for discrimination in this country, and we continue to try to find those remedies. When the old remedies don't work, it has been the Members from our side of the aisle who have introduced legislation to change the remedies that don't work. It has been the Members of our side of the aisle who have moved to new creative remedies, not only in discrimination, but in education, in health care, and in other important areas, which are so in keeping with the American tradition; nothing has changed in this country except that we now welcome the other side of the aisle in moving from the status quo to attempt to find new and better ways to bring equal opportunity to all Americans.

Mr. Hawkins. Mr. Ed Cooke, committee counsel, has a few technical questions.

Mr. Cooke. Chairman Thomas, my questions are largely technical, and I apologize for any redundancy that you might note in them.

For purposes of clarifying the record, will the Commission be utilizing goals, and time tables and, as appropriate, quotas? Will these be sought in conjunction with title VII enforcement in the future?

Mr. Thomas. The approach that we normally use for systemic nonlitigation settlements, and I don't presume to speak for general counsel or the other commissioners, is to have the Commission vote on the settlements. The settlements, over the past 2 years, have, to my knowledge, never included quotas but have included goals and timetables.

Mr. Cooke. I understand, would but the Commission in its litigation posture, if appropriate, seek formula relief?

Mr. Thomas. Under the present posture, I believe that that would be true.

Mr. Cooke. Do you anticipate any changes, and if so, what would be the basis for the changes, even if they are your personal views?

Mr. Thomas. I think after the Commission determines its policy, a redetermination of policy would be the only basis for change. In a recent interview, our newest commissioner indicated that, under certain circumstances, he believed that goals and timetables were, indeed, appropriate and that may be the view of the other commissioners as well. I did not and have not taken a poll of the commissioners.

Mr. Cooke. I understand. What is your personal view with respect to formula relief?

Mr. Thomas. I have generally opposed formula relief in cases other than class actions where we have a broad class of individuals.

Mr. Cooke. In the *Weber* case, the Supreme Court approved affirmative action, and it was based in part on statistical requirements, which was intended to establish a hiring quota of specific duration. I am talking here about voluntary affirmative action by a corporation.

What is your position on the *Weber* case in light of the problems you have quoted with statistics?

Mr. Thomas. I have not developed a specific opinion on *Weber* per se.

Mr. Cooke. You have no position on *Weber*?

Mr. Thomas. I have not developed a position on *Weber*. I think I could over time, but I think it would be imprudent for me to say that I have developed one on *Weber* when I haven't.

Mr. COOKE. And the Commission, to your knowledge, anticipates no further action other than the reviews that you have already mentioned with respect to that? I am talking about the standpoint of directing your general counsel in litigation?

Mr. THOMAS. We have not directed our general counsel at all in litigation.

Mr. COOKE. He is still free to seek formula relief?

Mr. THOMAS. Yes.

Mr. COOKE. You have mentioned several times that you do endorse victim-specific relief, that is to say relief for identifiable victims of discrimination. With respect to the make-whole relief that you would endorse personally, the kind of make-whole relief that you would endorse for an identified victim of discrimination, and with reference to the labor laws which specifically provide, among other things, that a corporation can be required to terminate individuals if they were hired in conjunction with an unfair practice of some sort. Do you endorse full make-whole relief for identifiable victims of discrimination, and would that include requiring a corporation to terminate individuals, if necessary, to put individuals back in their rightful seniority in the corporation?

Mr. THOMAS. I don't know exactly what you are trying to ask, but I think that the remedies that we do seek under title VII for individuals who have been discriminated against are simply not enough. I don't know whether or not title VII can provide for much more. But it should be much, much more that is actually provided for, and the stronger, the better.

So I would be for pushing it as far as it can go, and that is what we push for at the Commission.

Mr. COOKE. Am I to assume that then before you endorse wholeheartedly the concept of identifiable victims of discrimination, as opposed to formula relief, that you will formulate what is meant by make-whole relief?

Mr. THOMAS. Yes. In fact, I have been saying, and again I would like to note parenthetically that what I have said with respect to goals and timetables I have said before, and the only difference is that people are somehow noticing it. I didn't see what the big deal was about, but with respect to remedies, I have said time and again that I felt that if you really wanted to strengthen title VII, you would strengthen the remedial portion of it because it is really inadequate. We will try to do as much of that as possible under the present statute.

Mr. COOKE. I won't go any further on that.

Mr. THOMAS. We have developed a draft in-house of remedies that we will be pushing for in the future—increased remedies, not reduced remedies.

Mr. COOKE. We would like to know what those increased remedies might be.

Mr. THOMAS. Again, it is under discussion at the Commission level, and we will certainly advise you what they are.

Mr. COOKE. During hearings we held with the Department of Labor in which you also testified, you will recall one of the criticisms that was raised was that the Commission had not formulated any availability or utilization analysis of its own against which the Department of Labor utilization analysis could be judged. You indicated during those hearings that you thought that the Commission would be undertaking a review of that problem and would probably be at some point in time formulating regulations to provide guidance as to the appropriate use of availability and utilization analysis and that, of course, is consistent with your concern with the use or misuse of statistics.

Have you taken any steps in that regard, and if so, what are they?

Mr. THOMAS. That will be a part of our review. Again, I have indicated we will be reviewing two concepts of underrepresentation and underutilization, and we voted this past summer to review those concepts.

Mr. COOKE. One final question. What has the Commission done to insure that the Department of Justice and the National Endowment for the Humanities submit their affirmative action plans, and are you going to take any further actions on that?

Mr. THOMAS. There isn't anything provided under statute. That is, again, we have the responsibility with no enforcement clout.

Mr. COOKE. Thank you.

Mr. HAWKINS. Well, thank you, Mr. Thomas, for your appearance before the committee. We appreciate the efforts of your staff who have worked with our staff on various occasions and in the preparation of this hearing. We look forward to additional hearings from time to time with you, and we hope the same degree of cooperation will be extended in the future as has been in the past.

Mr. THOMAS. Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you.

The next witnesses will be a panel consisting of Mr. Barry Goldstein, assistant counsel, NAACP Legal Defense and Educational Fund; Mr. William Robinson, director of the Lawyers Committee for Civil Rights Under Law; and Mr. Richard Seymour, project director, Lawyers Committee for Civil Rights Under Law. Will those gentlemen please be seated at the table.

Mr. Goldstein, Mr. Robinson, Mr. Seymour. Is there an additional witness?

STATEMENT OF BARRY GOLDSTEIN, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

Mr. GOLDSTEIN. Mr. Seymour is sick today and regrets that he will not be able to attend.

Mr. HAWKINS. We look forward to your testimony, Mr. Goldstein. You have appeared before this committee before, and we certainly appreciate the excellent manner in which you have presented your previous testimony. We look forward to your testimony this morning. All of your prepared statement in its entirety will be entered into the record at this point. You may deal with it, I assume, in terms of the highlights from that testimony, but the testimony itself, the prepared statement, will be printed in the record in its entirety.

Mr. GOLDSTEIN. Thank you very much, Mr. Chairman, and thank you for the invitation to testify before this committee.

As usual, this committee has identified important civil rights and employment issues early in the game. That is critical.

Before this committee today are fundamental questions concerning the standards as enunciated by two landmark decisions, *Griggs* v. *Duke Power Co.*, and *Albemarle Paper Co.* v. *Moody*, and by the uniform guidelines and employee selection procedures for determining the legality of selection procedures, which disproportionately limit the employment opportunities of blacks, women, and other minorities.

The Legal Defense Fund has had long experience with these issues. Our former director-counsel, Jack Greenberg, who argued the *Griggs* case is now on the faculty of Columbia Law, and our present director-counsel, Julius Chambers, argued *Albemarle Paper Co.*

In the past, we have most often testified about technical issues. Today the issues are much broader. The recent pronouncements of the Chairman of the EEOC have challenged the use of statistics to prove discrimination, the application of the most important Supreme Court opinion on title VII, *Griggs*, the appropriateness of the uniform guidelines and the use of affirmative action.

Briefly, I would like to comment on the contradiction between Mr. Thomas' present comments and the comments which he made prior to November and then to go over in some detail what I think is the total misapplication of fundamental civil rights principles by Mr. Thomas.

First, Mr. Thomas has stated that he has serious reservations about the uniform guidelines because they encourage too much reliance on statistical disparities as evidence of employment discrimination. He does not stop there. He goes on to question the Supreme Court decision in *Griggs*, which underlines the uniform guidelines and much of fair employment law.

Mr. Williams, perhaps, as he stated since he is not a lawyer, he stated the *Griggs* principle very clearly, and I just briefly reiterate what he stated, which was absolutely correct. All it does is if there is a disparity resulting from a particular selection practice is shift the burden to the user of that selection practice to come up with some business reason which would justify the use of a practice which disproportionately excludes minorities or women from the employment opportunity. That is all.

The Supreme Court said that Congress directed the thrust of the act of the consequences of employment practices, not simply the motivation. More than that, again quoting the Supreme Court, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Last, the Chairman has called into question the use of affirmative action as a remedy for employment discrimination, and he did propose some new remedial approaches.

Let me just briefly talk about some conflicting interpretations by the Chairman to his recent pronouncements, not in order to embarrass the Chairman in any way, but because I think his earlier pronouncements were so correct and do provide such guidance for this committee and the rest of us.

The Chairman has recently stated that relief should be victim specific. In another letter to the Justice Department, which was sent in April 1983 and is attached to our comments, the Chairman said, writing for himself signing it just Chairman Thomas, finally the Commission was concerned with the breadth of the Department of Justice's position. Because that position would prohibit Court sanction to affirmative relief whenever the relief would benefit persons who were not actual victims of past discriminatory practices.

The position not only would invalidate the promotional goals at issue in the *Williams* case, it also would invalidate most other Court sanction perspective affirmative action, whether in recruitment, training, or hiring, and regardless of vastly diminished impact of these latter remedies on the legitimate expectations of innocent, nonminority employees.

We then concluded the Commission has reached diametrically opposite conclusions with regard to both the statutory and constitutional components of the Department of Justice's position. The Chairman has now moved from asserting in 1983 that the Commission reach diametrically opposite conclusions with regard to both the statutory and constitutional components of the Department of Justice's position with respect to victim-specific relief to asserting that EEOC's next 4 years will be marked by concerted efforts to set forth the Reagan administration's position on affirmative action.

He also went on to say in another letter in January of that year that the method by which the Department of Justice reached this conclusion that affirmative action, as we have known for over 15 years, was illegal and unconstitutional, was, to quote the Chairman, "This unilateral action by the Department of Justice is deplorable."

One other point on that matter. In comments to the media, the Chairman has said that in the last 3 or 4 years there has been a disjointed approach, which is certainly true, between the Justice Department and the EEOC. He attributes this, again, in the media to the failure of the Commissioners to take a more active role in the policy development and day-to-day activities of the Commission.

He told a reporter, "I don't appreciate reading in the paper that EEOC agreed to some settlement with quotas in it." Well, after listening this morning, I don't understand that statement at all, because I thought I heard the Chairman say that the last several years there have been no settlements with quotas in it.

In any case, it is clear that Chairman Thomas clearly reviewed nationwide settlements, such as the one involving General Motors Corp. and the UAW which provided for very explicit goals and timetables, such as providing that 15 percent of those chosen for apprenticeship openings will be minority and 12 percent will be women.

Let me turn to the major substance of my remarks, which is a review of the Chairman's comments and what they portend for the enforcement of fair employment law.

First, I don't think the Chairman can just state his personal views on the front page, which will be covered on the front page of the New York Times, and the most important position in that paper or in the trade press, and expect that people will interpret it just as his personal views. The Chairman is in the most critical role in the Federal Government for enforcing and establishing and educating people about the fair employment law, under Executive Order 12067.

EEOC is to define and set the fair employment policy in this government. Title VII provides that the Chairman shall be responsible for the administrative operations of the Commission. When the Chairman of the EEOC speaks, people in business and employee relations listen. Accordingly, the broad statements of the Chairman received prominent national and trade coverage. The statements by the Chairman that major and important principles for establishing liability, for example statistics, guidelines and the *Griggs* standard are suspect or have been over-applied is a message which will not encourage vigorous efforts by employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges of employment discrimination in our country.

Also, the public statements by the Chairman may affect hundreds of administrative and judicial proceedings being handled by the EEOC. I wonder how the lawyers who have spent more than a year in Chicago on the *Sears* case feel about reading in the press their boss' comments about their extensive efforts, just from a moral point of view, how does that affect people who are devoting their professional careers to following what are, as the Chairman admits, the established written procedures of the Commission.

I believe the Chairman suggested that he may be subpoenaed to testify in the *Sears* case. The company has, in fact, filed a motion to ask the judge to issue just such a subpoena, and we have attached that to our materials.

Let me turn to the substance of Mr. Thomas' remarks. He has criticized the uniform guidelines because they encourage too much reliance of statistical evidence of employment discrimination. He then says that the *Griggs* rule, which buttresses the principle of the guidelines, has been over-extended and over-applied. These statements show a failure to understand basic title VII law of the public policy in forming that law.

As Mr. Williams stated, all that *Griggs* says is that when there is a disproportionate effect of a selection procedure on minorities or women, the company has to come forward with some justification, some rationale, for using that selection procedure for the very good reason which Congress stated in 1972 over and over again; in fact, this committee was eloquent in stating the reason.

If a barrier is an artificial one, one that is not related to job performance and it contains the past patterns of discrimination in our country, why have it? The law is going to ban it. It is as simple as that.

How can that rule ever cause statistics to be overused? It is a statistical rule in the first instance. The first thing you have to do is to look at whether or not a selection procedure has a disproportionate impact on a group of people.

It is, by definition, statistically based. It doesn't mean, as Mr. Thomas seems to indicate, that the statistics alone would prove the legality. All it does is create a burden for the company to come forward and justify it with some business reason. That is all it does, by definition, it is a statistical rule. It doesn't make any sense to say that the *Griggs* rule or the testing guidelines require an overuse or have led to an overuse of statistics. It is an impossibility.

I have included in my testimony, which I will not read, the very strong statements of this committee and of the Senate Committee which set forth the justification of the *Griggs* rule and the specific incorporation and approval of the *Griggs* principle by the Congress.

What I am saying is not new. It has been said by this committee more than 12 years ago. The *Griggs* rule has not been affected one iota by any Supreme Court decision. I don't want to sound too strong on this, but there is no basis whatsoever for saying that any Supreme Court decision has modified *Griggs*, which is what the Chairman said.

Whether or not that is true, the fact that the Chairman of the EEOC goes out and says that recent Supreme Court decisions have modified *Griggs* is going to be interpreted by those in the business community and others that somehow this Commission is going to back off the strong enforcement of the *Griggs* principle.

Mr. **Hawkins**. If I may interrupt, the EEOC Chairman indicated his change of that statement on the *Stotts* decision. Would you elaborate on that as to whether or not that, in effect, changed *Griggs* or had any effect on *Griggs*?

Mr. **Goldstein**. Yes, Mr. Chairman.

The opinion in *Stotts* has nothing to do with *Griggs*. The *Griggs* opinion, for one, is not even mentioned by the Supreme Court in *Stotts*. The issue in *Griggs* was whether a certain pattern of conduct constituted a violation of title VII, where there was no showing of any intent to discriminate.

Stotts concerned a court's power to modify a consent decree in order to require a city to retain in a layoff situation junior black employees while dismissing white employees where there had been no proof of a violation of the law or showing that any blacks were victims of discrimination.

Griggs involved a violation case. *Stotts* involved a consent decree and a modification of the consent decree. There was nothing about what constitutes an illegal discriminatory action under title VII in Stotts. It just in the opinion has nothing to do with it.

I was going to count up the number of times the Supreme Court has reaffirmed the *Griggs* principle since 1971. I stopped at 10. It just goes on and on. In almost every employment case, they reaffirmed the principle in *Griggs*. In fact, in 1977, the Supreme Court said the Court has repeatredly held that a prima facie title VII violation may be stand-by policies that are neutral on their face and in intent, but that nevertheless discriminate, in effect, against a particular group.

Well, how do you measure effect? You look at the statistical consequences. Then you go to the justification. There is no basis whatsoever for the chairman's statement that *Stotts* or any other case modified *Griggs*.

The chairman's misunderstanding, and again it is not a dry exercise of trying to correct somebody's misinterpretation of the law, but that many more people understand or think they understand what employment law means by reading the chairman's statements in the media than they do by going to the U.S. reports and reading *Griggs*. That is what is so critical, including employers and unions.

The chairman's misunderstanding of the use of statistics and the application of *Griggs* is well illustrated by two examples, which he provided reporters. The first one was raised by the committee, the use of all blacks on the Georgetown basketball team. Now, that is really ridiculous.

Obviously, John Thompson or any other basketball coach can easily reply that the ability to run, jump and shoot is job related to playing basketball. It is a phony issue. There is no reported decision anywhere that would plummet to that depth of analysis, that would equate having an all-black basketball team at Georgetown with discrimination. It is just impossible.

What would be a more apt example is what happens if John Thompson decided to give a written test to the students of Georgetown to determine who would be the best basketball players. It would be related to basketball. You could ask what a back-tour place is, give and go. What the 10-second violation is, 3-second violation, all the things you need to know. I don't know how many blacks would get on the team. It probably wouldn't be all black.

Mr. HAWKINS. You may end up with girls.

Mr. GOLDSTEIN. That is certainly a possibility.

That is a more realistic example, because we have tests that measure a person's ability to understand literature, English at a very high level, that are given to prospective applicants to be carpenters, to be police officers.

Now, certainly some level of English is needed for those jobs, but to use that as a sole criterion, as many employers have used in many examples, as all of you are well aware, is something that discriminates, builds upon prior discrimination and is not job related.

Now, let me turn to the other example, and this example has two parts: first, to the hypocritical part. He says you get people, and I mean, who are the people? The chairman asked Mr. Thomas on many occasions, who are the people who are using these interpretations? All we get in the media is people.

I am sure you could find people who say some of these absurd things. You get people now saying if you don't have a certain number of women or blacks on the job, then you are guilty of discrimination. For example, if it is an engineering job and you don't have a certain number of blacks, because few blacks have engineering degrees, there are people who want to ask if you need an engineering degree, that is going too far.

Once again, the chairman creates a strawperson argument which has nothing to do with reality. You can search through the 35 or 36 volumes of reported employment decisions, the thousands of cases, and you will not see one case where there is any decision that engineering qualifications for an engineering position are illegal or discriminatory because there are fewer black engineers proportionately than there are blacks in the general population.

But perhaps what is even worse than these statements and examples is that Chairman Thomas misstates the *Griggs* opinion in a fundamental way, which gives a real misapplication of the decision to the public.

The chairman informed a Washington Post reporter that in *Griggs*, the company was "asking that workers have a high school diploma to dig ditches." Of course, the import of this in *Griggs* was so absurd because there were these low-skilled jobs that they were using a high school diploma for and it isn't so absurd if you move up on the job ladder. The fact of the matter is that Duke Power Co. never required people who dug ditches or any other manual labor to have a high school education diploma. Those jobs were in the Labor Department. That was the department in which blacks were in. They hired blacks to dig ditches. They hired people without high school education diplomas to dig ditches.

There were six other departments at the Dan River Power Station of Duke Power and they included maintenance with machinists, electricians, mechanics, tests in laboratories where there were lab technicians, power stations where there were controller operators and other machine operators. Those were the jobs in which a high school diploma was required and for which the Supreme Court unanimously struck down. Those are not simple manual jobs. Those are jobs for which one can make some argument that maybe a high school education requirement is required. However, what the Supreme Court said was that the burden is on the company to prove that, to establish that with some factual basis.

Let me turn to the last aspect of the Chairman's comments which concern remedy and unlawful discrimination and how one establishes discrimination.

Let me say to Chairman Thomas' credit, he indicates that there would be a need to develop new remedial approaches if race-conscious affirmative action ends or is substantially reduced. While he does not so state, Chairman Thomas may have reached this conclusion because of evidence that affirmative action has, during the brief period when it has been in effect, raised the overall employment position of minorities and women. And I think there is an extensive study by a Professor Leonard which shows that. He has done another study which shows that affirmative action, the enforcement of employment laws, is not in any way reduced or does not in any way reduce the productivity of the work force contrary to certain slurs made by people in the administration.

I would also just point out in a practical way, and I know you all are very familiar with big cities in this country and the dramatic change in the racial composition of the police forces in our cities, there has probably been no area of employment where affirmative action has been more used than with respect to police departments.

From 1970 to 1979, we saw a dramatic increase in the number of black police officers in the country. It almost doubled from 23,000 to 43,000; from 6.3 percent of the police force to over 9 percent. And let me say that I think that is a direct benefit for all Americans, black and white, that we now have police forces in our country that more mirror the population that they are to serve.

Let me turn to a couple of practical remarks regarding affirmative action. The Chairman has alluded to all of the opinions and the legislative history supporting affirmative action. We have presented testimony in the past documenting some of that. I will not do that here.

Let me just talk, as Chairman Thomas did, about some practical questions.

When Chairman Thomas criticized in very strong terms the Justice Department for taking the position that only victim-specific remedies can be used, he said it would undercut EEOC's existing settlements and future settlements. He was right. No question about it.

The standard that only proven victims of discrimination can receive a remedy would seriously undermine settlement and voluntary compliance. Every settlement that I am familiar with, and not just in the fair employment field, but in business litigation, the defendant always insists that in the settlement is a declaration that the defendant is innocent of any law-breaking. That couldn't work to settle a case if you can only give a remedy to a proven victim of discrimination. Then what do you do? You have to prove who was the victim of discrimination. If you do that, what is there to settle? The liability issue has to be settled. So you prove it.

Now, once you have proved it and somebody is an identifiable victim of discrimination, what is there to settle on the remedy? If you are entitled to $50,000 of back pay, are you going to settle for $20,000 of back pay at that point? You might before liability because you could always lose. So it would undercut settlement.

The last point that I would like to discuss on remedy, and it was one that was raised by Mr. Gunderson, is if this administration and individuals like Mr. Thomas are serious about trying to enforce the fair employment laws through focusing entirely on victim-specific remedies—I would give credit and some credence to that statement if the administration came forward with a bill that would provide for extensive victim-specific remedies in place of prospective remedies.

There was a compromise in Congress, as the Chairman well knows, over how much prospective relief to put in and how much remedial relief for individuals. It has worked in some ways to the advantage of white workers. You have an identifiable victim of discrimination. You know that a black person has lost a job because of discrimination. For every identifiable victim of discrimination, there is an identifiable beneficiary of discrimination. You identify that. Now, what happens? Does the black get the job? No. The white continues to work in the job and continues to reap the benefits of discrimination because the courts have said that we are going to take into account the interests of the white workers and we are not going to bump them from the job position.

Well, if you believe in victim-specific relief totally, then you should have bumping as Mr. Cooke suggested correctly is what is done in the labor law. Where is the administration bill coming forward with a proposal to bump white workers who have benefited from discrimination?

As Mr. Gunderson said, there is little monetary remedy for individuals in title VII. You have a 2-year back pay period. You are not entitled to pain and suffering and humiliation damages; the type that you get in an ordinary tort or contract case. You are not entitled to treble damages; the type of remedy you get in a business case. Where is the administration coming forward with a bill to put in compensatory punitive damages and treble damages? If that is done, then I might argue that I think it is a wrong-headed approach to dealing with the systemic practices of discrimination in this country and I would, but at least I could credit their good faith in waiting to deal with the problems of civil rights.

In conclusion, let me say, and it is outlined further in the conclusion of our statement, that at the time of the *Griggs* case, two noted Republican civil servants, Solicitor General Griswald and then-Chairman of the EEOC, Bill Brown, were strong supporters of the *Griggs* principle and made statements in the public that supported it. They were leaders for civil rights.

Let me conclude by saying that I hope the example of Mr. Griswald and Mr. Brown will be followed by Chairman Thomas and I have to say that I have some hope for that because in other matters which we have discussed with Mr. Thomas during the first Reagan administration, he has shown a willingness to listen and to consider opposing views. I hope he does that once again and reconsiders the statements which he has made in the press.

Thank you.

[Prepared statement of Barry Goldstein follows:]

PREPARED STATEMENT OF BARRY GOLDSTEIN, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. Chairman and Members of the Committee:

INTRODUCTION

Thank you for the invitation to testify before you on important questions of civil rights policy which have been recently raised. My name is Barry Goldstein, and I am an assistant counsel to the NAACP Legal Defense and Educational Fund, Inc., in its Washington, D.C. office. Before this Committee are the fundamental questions concerning the standards, as enunciated in the Supreme Court decisions in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and detailed in the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607 et seq. (1978), for determining the legality of selection procedures which disproportionately limit the employment opportunities of blacks, other minorities and women. The LDF has had long experience with these issues. For example, Jack Greenberg, the former director counsel of LDF, who moved to the Columbia Law faculty in July 1984, argued *Griggs* and Julius Chambers, the current director counsel, argued *Albemarle Paper Company*. In general LDF lawyers in conjunction with cooperating attorneys in private practice around the country have litigated hundreds of fair employment cases including many of the fair employment cases which have been litigated in the Supreme Court.[1]

In the past LDF staff members have most frequently testified before this Committee and the Subcommittee on Employment Opportunities regarding specific issues which were often of a technical nature. However, recent pronouncements from the EEOC, in conjunction with statements from others in the Administration, have questioned the basic principles of fair employment law. It is a real service that the Committee has scheduled this hearing in order to focus on these critical issues early in the process. What are the issues? In a series of pronouncements the Chairman of the EEOC has challenged the use of statistics to prove discrimination, the application of the most important Supreme Court opinion, *Griggs*, interpreting the fair employment law, the appropriateness of the Uniform Guidelines on Employee Selection Procedures, and the use of affirmative action. In section A we describe these recent pronouncements of the Chairman which question and appear to repudiate, at least to some degree, fundamental principles of fair employment law. In section B we contrast the positions taken by the Chairman after the November election with some of the contrary positions taken by the Chairman and the EEOC prior to the election. Finally, in section C we evaluate the substance and merit of the Chairman's recent statements. In general, the statements seriously misstate the principles and the application of employment law in a manner which, while we do not contend that this was the Chairman's purpose, will serve to provide ammunition for those who want to reduce substantially the reach and effectiveness of the fair employment laws. Furthermore, as we shall show, the alternatives proposed by the Chairman are not practical. It is our hope that the Chairman, who in the past has shown a willingness to change or accommodate his positions in the interests of civil rights enforcement, will reconsider his recent pronouncements.

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[1] *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 549 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976); *Brown* v. *General Services Administration*, 425 U.S. 280 (1976); *IUE* v. *Robbins & Myers*, 429 U.S. 229 (1976); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981); *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982); *United States* v. *Aikens*, 460 U.S. 711 (1983); *Firefighters Local Union No. 1784* v. *Stotts*, 81 L. Ed. 2d 483 (1984); *Cooper* v. *Federal Reserve Bank*, 81 L. Ed. 718 (1984); *Webb* v. *County Bd. of Education*, No. 83-1360, 53 USLW 3337 (argued Oct. 29, 1984); *Anderson* v. *City of Bessemer*, No 83-1623, 53 USLW (argued December 3, 1984).

A. RECENT POSITIONS STATED BY THE CHARIMAN OF THE EEOC

1. According to the New York Times, Clarence Thomas had said that he had " 'serious reservation' "about the existing Uniform Guidelines of Employee Selection Procedures (Guidelines) "because they encouraged too much reliance on statistical disparities as evidence of employment discrimination." "Changes Weighed in Federal Rules on Discrimination," N.Y. Times (Dec. 3, 1984) at A-1 (Attachment A). Chairmand Thomas amplified his comments by two examples, one apocryphal and one case-specific:

a. The Chairman gave the following examples: "If a predominantly white college, such as Georgetown University, has a black basketball team, you can't automatically assume that there was discrimination against whites." Id.

b. Thomas also stated that a case filed by the Commission is 1979 against Sears, Roebuck & Company, which has been in trial since September, "relies almost exclusively on statistics" to show discrimination against women. Id.

2. Accordingly, Thomas states that while "he did not flatly oppose all use of statistical evidence . . . there should be less reliance on statistics and more use of other forms of evidence based on actual conduct, such as oral testimony from witnesses telling what happened to me . . . a company's statements of hiring policy or height and weight requirements that excluded women." Id.

3. In the Chairman's view, The Uniform Guidelines on Employee Selection Procedures encourage "too much reliance on statistical disparities as evidence of employment discrimination" and that "the review of the guidelines was " 'the No. 1 item [illegible] my agenda.' " The EEOC has already acted to institute a review of the Guidelines. On October 22, 1984, the EEOC announced in the Federal Register that "[t]he Commission has recently voted to review [the Guidelines] in its entirely;" 49 Fed. Reg. 42205. An internal EEOC document indicated at least on the staff level the broad outline of issues which are proposed for review. (Attachment B).

4. Not only does the Chairman question the Guidelines but also he questions the application of the Supreme Court's opinion which established the judicial basis for use of the Guidelines. In *Griggs*, the Supreme Court stated that, "the Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference." (Footnote omitted), 401 U.S. at 433–34. The obligation of an employer to use only job-related selection procedures only applies where the procedure disqualifies a disproportionate number of blacks or members of other protected groups. See *Griggs*, 401 U.S. at 429.[2] The Court determined that "Congress directed the thrust of

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[2] The original Guidelines were issued by the EEOC on August 24, 1966. The Guidelines were reprinted in CCH Employment Practices Guide para. 16,904. These Guidelines were introduced into evidence in *Griggs* as plaintiffs' exhibit 33. They are located in the appendix filed before the Supreme Court. Appendix at 1296–1366. The Secretary of Labor applied the standard established in the EEOC Guidelines with respect to the employment practices of Federal contractors under Executive Order 11246, see, 33 Fed. Reg. 14392 (1968). The EEOC issued an expaned set of Guidelines on August 1, 1970. 35 Fed. Reg. 12333 (August 1, 1970). "Very similar guidelines [were] issued by the Secretary of Labor for the use of federal contractors." *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 431 n.29 (1975). The Court once again stated that the Guidelines, on this occasion the 1970 Guidelines, were "'entitled to great difference.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 431, quoting, *Griggs* v. *Duke Power Co., supra*. In 1976 the EEOC republished its 1970 Guidelines 41 Fed. Reg. 51984 (Nov. 24, 1976). The EEOC republished the 1970 Guidelines because three other Federal agencies, Department of Justice, Department of Labor, and the Civil Service Commission, had published another set of Guidelines, which we called the Federal Executive Agency Guidelines, 41 Fed. Reg. 51734 (Nov. 23, 1976). After an extensive comment period, which included a full day of hearings on April 10, 1978, the Government adopted a uniform set of guidelines. The Uniform Guidelines on Employee Selection Procedures were published on August 25, 1978. 43 Fed. Reg. 38290.

the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (Emphasis in original) 401 U.S. at 432. The basic principle underlying the Guidelines is the *Griggs* standard, that where a selection procedure adversely affects the opportunities of blacks, other minorities, or women, then the employer has the burden to show that the selection procedure is job-related.[3] See Uniform Guidelines, section 3, 29 CFR § 1607.3

Chairman Thomas told a reporter for the New York Times that "recent decisions of the Supreme Court may have 'drawn into question' landmark rulings in cases such as *Griggs* v. *Duke Power Company*, decided in 1971." See Attachment A. Subsequently, the Chairman told a reporter for Washington Post that the Supreme Court opinion in *Firefighters Local Union No. 1784* v. *Stotts*, 81 L. Ed. 2d 483 (1984), "modified Griggs." EEOC Chief Cites Abuse of Racial Bias Criteria," Washington Post (December 4, 1984) at A-13 (Attachment C). Chairman Thomas stated that he did not mean that *Griggs* "is bad law" but that *Griggs* "has been overextended and overapplied." He gave the following example: "You got people now saying if you don't have a certain number of women or blacks on the job then you are guilty of discriminating . . . if it's an engineering job and you don't have a certain number of blacks because few blacks have engineering degrees there are people who want to ask if you . . . need an engineering degree. . . . That's going too far." Id.

5. Also Chairman Thomas has recently indicated that the EEOC will take a different direction on remedy. Mr. Thomas has stated that "relief should be victim specific and that 'affirmative action' should consist of outreach efforts rather than numerical goals and timetables." Daily Labor Report (D. R) No. 227 at A-6 (November 15, 1984) (Attachment D). Pursuant to this approach the Commission voted to review the longstanding requirement that Federal Government agencies submit numerical goals and timetables as part of a multi-year affirmative action program. He further indicated that "this approach of reexamining the necessity of goals and timetables is likely to be extended to the private sector soon." Id.

6. Thomas stated that the Commission "will be looking at new remedial approaches." " 'We're talking about things we can monitor . . . . Like taking action against those who were responsible. We're going to start pushing in court for remedies against those individuals. For example, remove the head of the personnel office. Bring in new people. Actual changes.' " Id.

B. CONFLICT BETWEEN RECENT STATEMENTS OF CHAIRMAN THOMAS AND THE POSITIONS OF THE EEOC AND THE STATEMENTS OF CHAIRMAN THOMAS PRIOR TO NOVEMBER 1984

The Chairman has recently stated that "relief should be victim specific." See section A.5. On April 5, 1983, Chairman Thomas wrote a four-page letter to Attorney General William French Smith which strongly criticized the Justice Department's brief in *Williams* v. *City of New Orleans* (5th Cir. No. 82-3435). Chairman Thomas criticized the "breadth of the Department of Justice's position" under both Title VII and the Constitution. (Attachment E). The letter forcefully states the EEOC position opposing the Justice Department's "victim-specific" approach.

"Upon learning of the Department of Justice's position in the *Williams* case, the Equal Employment Opportunity Commission became very concerned about the serious impact that position would have, if adopted, both on Commission policy and on cases in which the Commission is a party. For example, if the Department of Justice's position were to become law, it might well invalidate inumerable conciliation agreements, consent decrees, and adjudicated decrees to which the Commission is a party, as well as the Commission's own published guidelines regarding appropriate affirmative action under Title VII (29 C.F.R. Part 1608 (1982)). Similarly, that position also would affect the Commission's current efforts to obtain affirmative action remedies in pending conciliations and litigation. Finally, the Commission was concerned with the breadth of the Department of Justice's position. Because that position would prohibit court-sanctioned affirmative relief whenever the relief would benefit persons who were not actual victims of past discriminatory practices, the position not only would invalidate the promotion goals at issue in the *Williams* case, it also would invalidate most other court-sanctioned prospective affirmative action—whether in recruitment, training, or hiring, and regardless of the vastly diminished impact of these latter remedies on the legitimate expectations of innocent nonminority employees.

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[3] In other words, the employer must show that the use of the selection procedure will result in the selection of employees who are better able to do the job than the employees who would be selected in the absence of the procedure.

"For these reasons, the Commission undertook its own review of the position proposed by the Department of Justice in *Williams*. As I indicated above, the Commission reached diametrically opposite conclusions with regard to both the statutory and constitutional components of the Department of Justice's positions."

The Chairman has now moved from asserting in 1983 that "the Commission reached diametrically opposite conclusions with regard to both the statutory and constitutional components of the Department of Justice's position" to asserting that "EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administrative's position on affirmative action. . . ." DLR No. 2[illegible]1, *supra* (Attachment D).

It is understandable that, as a general matter, Chairman Thomas would want the Administration to speak with one voice on such an important matter as affirmative action. However, in another letter to Attorney General Smith, dated March 21, 1983, Mr. Thomas stated that "[b]ecause of the importance of these issues [concerning affirmative action] to the Commission's activities, and because of the Commission's difference with the Civil Rights Division on these issues, the Commission determined that it should make its views known to the Fifth Circuit by participating as amicus curiae in the *Williams* case. Although the Commission's position in this regard unfortunately will result in a public difference of opinion between the Civil Rights Division and the EEOC, I do believe that considerable public benefit will result for squarely jointing these important legal issues for consideration by the Fifth Circuit." (Attachment F).[4]

The Chairman apparently implied to the Daily Labor Report that the "disjointed approach" towards affirmative action, with EEOC supporting race-conscious remedies where necessary and the Justice Department opposing all such efforts, was due to the failure of the Commissioners to "take a more active role in policy development and day-to-day activities." He told the reporter "I don't appreciate reading in the paper the [EEOC] agreed to some settlement with quotas in it." (Attachment A). As the strong letters from Chairman Thomas to the Attorney General demonstrate, the EEOC's fight to resist the anti-affirmative action policy of the Justice Department was directed at the Commission not the staff level.

Moreover, the most wide-ranging conciliation agreement entered into by the EEOC during Chairman Thomas' tenure was between the EEOC and General Motors Corporation and the United Automobile, Aerospace, and Agricultureal Implement Workers of American. The agreement which was entered in the Fall 1983 provided for explicit race-conscious and sex-conscious remedies. For example, the agreement provides that "[t]he Corporation and the Union shall make good faith efforts to assure that in each reporting period during the term of the Agreement, Minorities are at least 15.5% of those chosen for apprenticeship openings and women are at least 12.0% . . . ." Of course, Chairman Thomas was aware of this conciliation agreement which covered tens of thousands of workers.

Finally, as Chairman Thomas indicates in his 1983 letter to the Attorney General, the EEOC policy regarding affirmative action was codified and remains codified in the EEOC Affirmative Active Guidelines. 29 CFR § 1608. The Guidelines provide that "the action taken pursuant to an affirmative action plan or program must be reasonable in relating to the problems disclosed by the self analysis [of employment practices]. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employers." (29 CFR § 1608.4(c)). If an EEOC employee entered into or negotiated a race-conscious affirmative action agreement the employee was merely following the published policy of the EEOC.

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[4] Not only did the Commissioners find the substance of the Justice Department's position on affirmative action objectionable, but also they found the process for reaching the decision objectionable. A letter to Attorney General Smith dated January 26, 1983, and signed by each of the Commissioners, provided as follows: "Without commenting on the merits of the position [on affirmative action], we feel that the Department's attempt to initiate a major and, as it turned out, newsworthy change in the government's Civil Rights policy, without even consulting the Equal Employment Opportunity Commission, constitutes not only a sharp departure form acceptable standards of inter-agency protocol but was an action taken in derogation of this agency's statutory designation as the chief interpreter of Title VII of the Civil Rights Act of 1964, as amended. . . . Every member of the Commission finds this unilateral action by the Department of Justice deplorable." (Attachment G).

C. ANALYSIS OF THE RECENT POSITIONS STATED BY THE CHAIRMAN OF THE EEOC

1. Overview.—The Chairman of the EEOC has a critical role in formulating the enforcement policy for the fair employment laws of the Federal Government and for insuring the important public policy purposes of the laws. "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973). Pursuant to Executive Order 12067 "[t]he Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of [the Federal Government] to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity . . . ." Title VII provides that "[t]he Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission . . . ." Section 705(a), 42 U.S.C. § 2000e-4(a).

Accordingly, the broad statements of the Chairman which received prominent coverage by the national and trade media, see section A, are critically important. The statements of the Chairman are closely watched by the business community and others who must respond to the federal fair employment policy. Whether the public believes that the EEOC and the Federal Government is enforcing the law vigorously is probably as important as the actual enforcement. Accordingly, when the Chairman publicly indicates that major and important principles for establishing liability—for example, statistics, Guidelines, and the *Griggs* standard—are suspect or have been "overapplied," the message is not one which will encourage vigorous efforts, by employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. *Albemarle Paper Co.* v. *Moody,* 422 U.S. at 418, quoting, *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 379 (8th Cir. 1973).

It is not just employers and unions who are influenced by the general positions of the EEOC. Courts understand and appreciate the role of the EEOC. In 1983, the Sixth Circuit approved the use of a race-conscious affirmative action program for promotion of police officers. The City of Detroit had voluntarily instituted the plan. *Bratton* v. *City of Detroit,* 704 F.2d 878 (6th Cir.). After the decision, the Justice Department moved to intervene in order to argue that the appeal should be reheard by te entire Court and that the affirmative action plan should be rejected. The Sixth Circuit denied the Motion to intervene because the Court "note[d] that the Justice Department's claim in this regard lacks much of the weight it might otherwise carry given the conflict between the position the Department has taken here and that taken by others vested with enforcement powers under Title VII, particularly, the Equal Employment Opportunity Commission." *Bratton* v. *City of Detroit,* No. 83-1837, (Order entered May 27, 1983) (Attachment H). In effect, the Sixth Circuit took judicial notice of the conflict between the EEOC and the Justice Department regarding race-conscious affirmative action, and used that conflict as a reason to deny the Justice Department's motion to intervene.

The public statements by the Chairman also may affect the hundreds of administrative and judicial proceedings involving the EEOC. The Chairman's specific comments regarding the EEOC's civil action against Sears, Roebuck and Co., a case which is in the middle of a lengthy trial, has resulted in the filing of a motion by the Company to take Chairman Thomas' deposition. (Attachment I). The Company asserts, among other things, that the Chairman's statements regarding statistics serve to support its defense. Moreover, the Company states that "[i]t is apparent from his statements that this case has been litigated for two and one half years, since May 1982, despite Mr. Thomas' concern about basing cases of this type wholly on statistics." Id. at 4. The Company indicates that accordingly if the EEOC fails to prevail in the case that the EEOC should be assessed the Company's attorney's fees under the standard that such fees be assessed if the "'claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 422 (1978)." Id. at 4-5.

2. Establishing Unlawful Discrimination: Griggs, Use of Statistics, and the Uniform Guidelines.—The Chairman has criticized the Uniform Guidelines because it has encouraged "too much reliance on statistical disparities as evidence of employment discrimination." See section A.1, 3. The Chairman further criticized the application of the *Griggs* rule, which buttresses the basic principle of the Guidelines, as being "overextended and over-applied." See section A.4. These statements do not reflect a proper understanding of Title VII law or the public policy behind the law.

In effect, the *Griggs* rule is based in the first instance solely on statistics. In *Albermarle Paper Co.* the Supreme Court clearly stated the *Griggs* rule.

"In *Griggs* . . . this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." (422 U.S. at 425). Footnote and citations omitted.

The *Griggs* rule requires an evidentiary showing that the selection practices at issue selects persons "in a racial pattern significantly different from that of the pool of applicants." A statistical showing that a test results in the exclusion of a significantly disproportionate number of minorities from employment opportunities creates a prima facie case of discrimination under the *Griggs* rule.

The Uniform Guidelines only restate the *Griggs* rule. To argue broadly, as the Chairman does, that the Guidelines encourage "too much reliance on statistical disparities" indicates a failure to perceive that by definition under *Griggs* a statistical disparity establishes a prima facie case. When the prima facie case is established the burden shifts to the employer to show that the "requirement [has] . . . a manifest relationship to the employment in question;" in other words, the employer must show that success in the selection procedure for example, a test or an educational requirement, actually predicts success on the job.

In considering the 1972 amendment to Title VII this Committee well articulated the *Griggs* rule and the congressional and public policy supporting the rule.

"Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs* v. *Duke Power Co.*, — U.S. —, 91 S.Ct. 849, 3 FEP Cases 175 (S.Ct. 1971), where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.

It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful." (Footnote omitted) H.R. Rep. No. 92-238, 92d Cong. 1st Sess. at 8 (1971).[5]

In passing the Equal Employment Opportunity Act of 1972, Congress gave the recently issued opinion in *Griggs* strong approval. Since the issuance of *Griggs* in 1971 the Supreme Court has affirmed the holding on repeated occasions. ". . . [T]he Court has repeatedly held that a prima facie Title VII violation may be established by policies that are neutral on their face and in intent but that nevertheless discriminate in effect against a particular group." *Teamsters* v. *United States*, 431 U.S. 324, 349 (1977).

Chairman Thomas was quoted in the New York Times as stating that "recent decisions of the Supreme Court may have 'drawn into question' landmark rulings in cases such as Griggs. . . .," and was quoted in the Washington Post as stating that the recent *Stotts* opinion "modified Griggs." See section A.4 These are extraordinary statements. no recent Supreme Court case calls "into question" the landmark decison in *Griggs*. The opinion in *Stotts* has nothing to do with *Griggs*. The *Griggs* opinion is not even mentioned by the Supreme Court in *Stotts*. The issue in *Griggs* was whether a certain pattern of conduct constituted a violation of Title VII where there was no showing of intent. *Stotts* conerned a Court's power to modify a consent decree in order to require a city to retain in a lay-off situation junior black employees while displacing senior white employees where there had been no proof of a violation of the law or showing that any blacks were the victims of discrimination. There is simply no connection between the opinion in *Griggs* and the opinion in *Stotts*.

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[5] The Senate Report included similar languages. S. Rep. No. 92-415, 92d Cong., 1st Sess. at 5 (1971). In addition, the Report provided that "Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on 'paper' credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g., *Griggs* v. *Duke Power Co.*, . . .). *The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in trying to meet such artificial qualification.*" (Emphasis added); *Id.* at 14.

The Chairman's misunderstanding of the use of statistics and the application of *Griggs* is well illustrated by two examples which he provided reporters. The Chairman attempts to show that statistics are overrused and may be misleading by stating that you "can't authomatically assume that there was discrimination against whites" because Georgetown University "has a black basketball team." Section A.1. Obviously, John Thompson, or any other basketball coach, can easily reply that the ability to run, jump, and shoot is "job related" to playing basketball. It is a phony issue to raise this example which has nothing to do with the application of *Griggs* and the Uniform Guidelines.

Chairman Thomas provides another example in order to show that *Griggs* "has been overextended and over-applied." He states that "[y]ou get *people* now saying if you don't have a certain number of women or blacks on the job then you are guilty of discriminating [. For example,] if it's an engineering job and you don't have a certain number of blacks because few blacks have engineering degrees there are *people* who want to ask if you . . . need an engineering degree . . . . That's going too far." (Emphasis added) Section A.4. Once again, the Chairman creates a straw person argument which has nothing to do with reality. In the 35 volumes and thousands of decisions under Title VII there is not a single decision that questions the use of engineering qualification for an engineering job.

Chairman Thomas misstates critical facts in the *Griggs* decision in a manner which gives an erroneous implication to this opinion. The Chairman informed a Washington Post reporter that in *Griggs* the Company was "asking that workers have a high school diploma to dig ditches." "EEOC Chief Cites Abuse of Racial Bias Criteria," Washington Post (December 4, 1984) at A-13 (Attachment C). In fact, the Duke Power Company never required a high school diploma for the Labor Department where jobs requiring manual work such as ditch digging were located.[6] *Griggs* v. *Duke Power Co.*, 401 U.S. at 427-28. The high school education requirement, which was struck down by the Supreme Court, was used by the Company for selection of employees into departments with skilled jobs, such as "Maintenance" where there were machinist and electrician-welder position, "Power Station Operators" where there were machine operator positions, and "Test and Laboratory" where there were technician positions. *See* n.6, *supra*. Chairman Thomas' statement that the high school education requirement was used by Duke Power Company gives the false and misleading impression that the decision might somehow be limited to menial positions, such as ditch-digging.

3. Remedying Unlawful Discrimination.—Chairman Thomas has indicated that he intends to lead the EEOC away from positions which the EEOC took during the first Reagan Administration supporting race-conscious affirmative action principles, *see* section B, and towards "concerted efforts to set forth the Reagan Administration's position on affirmative action—favoring victim-specific remedies." DLR No. 221 (Nov. 15, 1984) at A-6 (Attachment D). Mr. Thomas further stated that "affirmative action should consist of outreach efforts rather than numerical goals and timetables." Id.

Chairman Thomas has not described in any detail any legal or other basis which propels the EEOC to begin to shift from its position over the past several years. In this presentation we also do not undertake to argue as we have previously before congressional committees the legal and constitutional justification for affirmative action.[7] Rather we respond to Chairman Thomas' suggestion for alternative remedies and describe some likely practical consequences of terminating race-conscious affirmative action.

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[6] The Dan River Steam Station of Duke Power Company had seven departments. *Griggs* v. *Duke Power Co.* 292 F. Supp. 243, 245 n.1 (M.D.N. Car. 1968). These findings of fact by the district court were not questioned on appeal. The departments and the jobs in each department are set forth below:

Power Station Operators: Control Operator, Pump Operator, Utility Operator, Learner.

Coal and Material Handling: Coal Handling Foreman, Coal Equipment Operator, Coal Handling Operator, Helper, Learner.

Maintenance: Machinist, Electrician-Welder, Mechanic A, Mechanic B, Repairman, Learner.

Labor: Labor Foreman, Auxiliary Serviceman, Laborer (Semi-Skilled), Laborer (Common).

Miscellaneous: Watchman, Clerk, Chief Clerk, Chief Clerk, Storekeeper.

Supervisors: Superintendent, Assistant Superintendent, Plant Engineer, Assistant Plant Engineer, Chemist, Test Supervisor, Maintenance Supervisor.

Test and Laboratory: Testman-Labman, Lab and Test Technician, Lab and Test Assistant, Assistant Maintenance Supervisor, Shift Supervisor, Junior Engineer.

To Chairman Thomas' credit he indicates that there would be a need to develop "new remedial approaches" if race-conscious affirmative action ends or is substantially reduced. While he does not so state, Mr. Thomas may have reached this conclusion because of evidence that affirmative action has during the brief period when it has been in effect raised the overall employment position of minorities and women.[8]

Chairman Thomas indicates that "we're talking about things we can monitor." Section A.6. This is a strange reason for turning to "new remedial approaches" and away from numerical goals. A clear benefit of race-conscious affirmative action was that it provided a bright-line method for monitoring compliance with remedial programs. For example, under the 1983 EEOC General Motors conciliation agreement the Company and the UAW pledged to make good faith efforts to fill 15.5% of apprenticeship positions with minorities and 12% with females. See pp. 10-11, supra. It does not take much time for GM or UAW officials to check whether their managers are meeting the goals. If the goals are not met, then the officials know that they must review carefully the efforts which were taken to select apprentices and to determine the reason why more minorities or women were not selected. Similarly, the EEOC employees responsible for insuring that there is compliance with the agreement may readily determine whether GM and the UAW are meeting their obligations. Furthermore, the use of numerical goals—management by objective—for monitoring the work of supervisors is a common and effective business technique. It is understandable that such an approach has proved effective to overcome the effects of prior discrimination and to open job opportunities for minorities.[9]

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[7] See Statement of William T. Coleman, Jr., Chairman, NAACP Legal Defense and Educational Fund, Inc., In Re Affirmative Action to End the Effects of Racial Discrimination and Segregation Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Washington, D.C., June 11, 1981.

[8] For example, Richard B. Freeman, an economist at Harvard University and at the National Bureau of Economic Research, has described a comprehensive study of the effects of affirmative action:

"The recent analysis of employment patterns in some 68,000 establishments by Jonathan Leonard provides what is perhaps our best scientific evidence on the extent to which affirmative action has raised employment of protected groups. Leonard compares the employment and occupational position of minorities and women in federal contract establishments (those subject to affirmative action) with that of minorities and women in other establishments in the period 1974-1980 and finds powerful evidence that the federal affirmative action effort raised the overall employment and employment in better occupations for protected groups.

"Leonard's analysis found substantial independent effects for whether or not an establishment underwent a compliance review and for its specific affirmative action goals (both raise minority and female employment), indicating that the affirmative action effect is linked to specific policy actions rather than being general and diffuse. In a separate analysis he compared the wages in industries in which many workers are employed by federal contractors with those in which few are employed and found a 9-15 percent wage advantge for blacks in the contractor sector."

(Footnote omitted). Freeman "Affirmative Action: Good, Bad or Irrelevant?" New Perspectives (U.S. Commission Civil Rights, Fall 1984) 23, 25. See Leonard, "Splitting Blacks?: Affirmative Action and Earnings Inequality Within and Across Races," Working Paper No. 1327, National Bureau of Economic Research, April 1984.

Professor Freeman also stated that Professor Leonard in another study, "the only significant study" on the subject, established that affirmative action did not reduce efficiency or waste resources. New Perspectives, supra at 26. See Leonard, "Anti-discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity," Working Paper No. 1240, National Bureau of Economic Research, November 1983.

[9] The use of race-conscious affirmative action probably was used more during the 1970's for the hiring and promotion of police officers than for any other category of jobs. Accordingly, the substantial increase in the number of black police officers in the United States from 1970 through 1972 is instructive. In 1970, 6.34% or 23,796 of the 375,494 policemen and detectives in the country were black, whereas in 1979 approximately 9%, or 43,560 of 484,000, were black. In the last decade over 20,000 black officers have been added to law enforcement agencies. U.S. Bureau of the Census, "Census of the Population: 1970, Vol. 1," "Characteristics of the Population, Part 1, United States Summary—Section 1," Table 223 (1973). "Statistical Abstract of the United States 1980," Table 697. The information for the most recent year groups "blacks and others." Since "others" comprise about 10% of this category the figure 9.9% was reduced by 10% in order to make the figure comparable to the 1970 census data.

The only "new remedy" which Chairman Thomas suggests is the "remov[al of] the head of the personnel office" which discriminates. See p. 7, *supra*. The short answer to this proposal is that neither Title VII nor any other fair employment law provides for the replacement of discriminatory managers. However, even if we assume that we may overcome the legal hurdle or that Congress passes a law permitting such forceful permanent displacement of persons from job positions, there are enormous practical problems. For example, how would you determine which official you would displace: the immediate foreman who discriminated, the supervisor who knew of the discrimination and acquiesced, the personnel manager who countenanced discrimination, or all of them. Presumably, all supervisors who might face removal would be entitled to be named in the complaint and to be represented at trial. It is easy to imagine the litigation problems, delay and complexity which would be caused by this proposed remedy.

In any event, the proposal for the forcible removal of personnel managers who discriminate (or whose subordinates discriminate) is an impractical as affirmative action has proved practical. One of the major practical benefits of affirmative action is that it is an effective method for settling employment disputes.

Chairman Thomas has indicated that the EEOC would move towards the remedial standard asserted by the Justice Department, that a remedy may only be awarded to proven victims of discrimination. This standard would seriously undermine settlement and voluntary compliance. In every settlement with which I am familiar the defendants have insisted that the settlement provide that there is no admission or determination of liability. Moreover, in order for a settlement to provide a remedy under the victim-specific theory which Chairman Thomas has asserted the recipients of that remedy must be "proven discriminatees." In other words, there is little possible room for settlement of the liability issue. Furthermore, once an individual has established that he or she is a "proven discriminatee" then, of course, the person will seek "full" relief. There is no room for compromise or settlement. The resource requirements which would be necessary to establish individual entitlement to injunctive and back pay relief in even a modest class action of 500 persons are enormous. As a practical matter, Chairman Thomas was correct in his March 21, 1983 letter to the Attorney General that the victim-specific approach to remedy "would prohibit the courts from responding with broad remedial prospective relief, and thereby limit remedies even for systemic Title VII violations to the more limited 'make whole' remedies characteristic of single-plaintiff lawsuits." (Attachment F).

Even though Chairman Thomas perceived and articulated the failure of a victim-specific theory to remedy adequately systemic discrimination, Chairman Thomas appears now to be steering the EEOC towards the adoption of the theory. A victim-specific relief approach under Title VII is especially inadequate because as presently drafted and construed Title VII does not provide adequate individual relief.

In early important decisions, the courts substantially compromised complete individual relief for the victims of employment discrimination. Even if a black worker had been discriminatorily denied a job for which he was qualified the courts did not immediately order that the victim be placed in the job. See e.g., *Papermakers, Local 189* v. *United States*, 416 F.2d 980 (1969), cert. denied, 397 U.S. 919 (1970). Rather the courts ordered that the victim must wait for a "vacancy" to occur in the job position, and that the white job incumbent even though he or she is the beneficiary of discrimination would not be "bumped" from the job. If your overriding principle is, as the Justice Department has asserted and as Chairman Thomas now implies, full individual relief, there is no justification for denying relief to the black worker because of concern for the white worker who moved into the job as a result of discrimination.

The "no bumping" limitation, like race-conscious affirmative action, was a practical response to making Title VII work in an effective and least-disruptive manner. In their equitable remedial application of Title VII the courts have tried to take into account the interests of white and black workers. If the EEOC rejects the application of affirmative action as a practical and effective remedy and seeks to rely entirely on "proven" victim relief, then a major stumbling block—the "no bumping" rule—to effective individual relief should be removed.

Furthermore, Title VII provides only limited monetary relief. A victim may receive only a back pay aware for a limited two-year period. Title VII precludes compensatory and punitive damages. See e.g., *Walker* v. *Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982). There is no monetary remedy for the pain, suffering, and humiliation of racial discrimination. An approach to the enforcement of the antidiscrimination employment laws which depends solely upon seeking full relief for individual proven victims of discrimination should properly include the development, by statutory change or otherwise, of substantially more extensive provisions for monetary relief.

At least, Chairman Thomas has recognized the need for "new remedies" if race-conscious affirmative action is eliminated. If Chairman Thomas and others in the Administration are serious regarding the enforcement of the fair employment laws through the award of full and effective individual relief, then the Administration should push for effective individual remedies, such as compensatory damages and the right of a discrimination victim to the immediate occupancy of a job from which he or she had been illegally excluded.

In July Clarence Thomas put it well: "There is a very strong perception that the Justice Department has been too aggressive on bussing and quotas and has set a negative rather than a postive agenda on civil rights." "Leading Black Republicans Assail Reagan Rights Aide," New York Times (July 9, 1984) at A-10 (Attachment J). Hopefully, Chairman Thomas will re-think his recent statements and not follow the "negative agenda" set by the Justice Department.

CONCLUSION

On May 25, 1970 the Supreme Court invited the Solicitor General to express the views of the United States regarding whether the Court should grant the petition for a writ of certiorari and agree to hear the appeal in *Griggs. Griggs* v. *Duke Power Co.*, 398 U.S. 926. Solicitor General Erwin Griswold filed a brief arguing strongly that the Supreme Court should take the case.

"The issue is one of a high importance because use of employment criteria of the kind utilized by the Company here is widespread in many parts of the country today. Yet these criteria bear no demonstrated relationship to employees' abilities to perform the jobs for which they are used, and they operate to disqualify Negroes in substantially higher proportions than they do whites. In these circumstances, the use of such criteria needlessly perpetuates the effects of past discrimination, and is, in our view, prohibited by Title VII of the Civil Rights Act of 1964."

Brief of the United States, *Griggs* v. *Duke Power Co.*, No. 69-124 (filed June 16, 1970) at 6. The Chairman of the EEOC during this period, William H. Brown, III, also asserted the importance of the standard which became the *Griggs* rule. Shortly after his appointment, on November 26, 1969, Mr. Brown asked representatives of more than forty trade associations to "review selection and testing procedures to make sure they reflect actual job requirements." *Griggs* v. *Duke Power Co.*, 420 F.2d 1225, 1240 n.8 (4th Cir. 1970) (Judge Sobeloff dissenting), quoting, 72 LRR 413, 416 (Dec. 8, 1969).

Mr. Griswold and Mr. Brown, two outstanding Republican civil servants, took leading roles at a pivotal time in the development of fair employment law to explain and argue the critical necessity for requiring employers to show a business justification for selection practices which had a significantly disproportionate effect on minorities. To do otherwise would permit the effects of prior discrimination which limited the educational and other opportunities of blacks to continue to limit their employment opportunities in a needless and artificial manner. See also pp. 15-17, n.5, supra.

Once again the fundamental principles that support *Griggs* and fair employment law are being challenged. In our view, Chairman Thomas has made some critical errors in interpreting these principles. However, Chairman Thomas has shown an ability and willingness in the past to listen carefully and evaluate opposing viewpoints and to argue forcefully for important civil rights principles. See section B. We hope that Chairman Thomas and the EEOC will review the important matters that Mr. Thomas recently has addressed, and that the examples of Mr. Griswold and Mr. Brown in establishing the *Griggs* v. *Duke Power Co.*, Griggs standard will provide support for the Commissioners in defending the *Griggs* standard, the Uniform Guidelines, and the principles related to the *Griggs* standard.

[The New York Times, Dec. 3, 1984]

Attachment A.—Changes Weighed in Federal Rules of Discrimination

(By Robert Pear)

Washington, December 2.—Federal officials have begun an extensive review of whether to change the guidelines used to detect patterns of discrimination in employment against blacks, women and Hispanic Americans.

Business groups support the effort to change the rules and civil rights groups oppose it, for similar reasons: They believe the changes would make it easier, in enforcement proceedings, for employers to defend the proportion of women or members of minority groups in the work force at factories, offices or other places.

Officials of the Equal Employment Opportunity Commission, the United States Commission on Civil Rights, the Federal Office of Personnel Management and the Justice Department are reviewing the guidelines. They apply to all public and private employers with 15 or more workers.

'SERIOUS RESERVATIONS' EXPRESSED

Clarence Thomas, chairman of the Equal Employment Opportunity Commission, said he had "serious reservations" about the existing guidelines because they encourage too much reliance on statistical disparities as evidence of employment discrimination.

Civil rights groups, who say they see no reason to change the existing rules, say the changes contemplated by the Reagan Administration would make it more difficult for women and members of minority groups to prove discrimination.

The rules, or the Uniform Guidelines on Employee Selection Procedures, were issued in 1978 following versions adopted by the employment commission in 1966 and 1970.

ENFORCING 1964 RIGHTS LAW

Courts defer to the guidelines as an authoritative interpretation of the Civil Rights Act of 1964, the basic statute prohibiting job discrimination, and the law is put into effect through application of the guidelines to specific situations.

The rules could be changed by the Equal Employment Opportunity Commission. No action by Congress would be required.

The basic principle of the existing guidelines is that any test or selection procedure that has an "adverse impact" on a particular race, sex or ethnic group is illegal unless it can be justified on the basis of "business necessity." A procedure having an adverse impact "constitutes discrimination unless justified," the guidelines say.

The guidelines apply to "all selection procedures used to make employment decisions" including interviews, application forms, physical requirements and evaluations of performance. They apply to decisions about hiring, promotion, transfer and dismissal.

Under the guidelines, if the selection rate for blacks is less than 80 percent of the rate for whites, that is taken as evidence of adverse effect and may justify further investigation by the Government. The same would be true if the selection rate for women was less than 80 percent of that for men.

The guidelines say that Federal agencies will generally be guided by the "80 percent rule," and offer this example:

If 80 whites apply for a job and 48 are chosen, the selection rate is 60 percent. If 40 blacks apply and 12 are hired, their selection rate is 30 percent. Since the selection rate for blacks is half that for whites, there is evidence of adverse impact. To reach 80 percent of the rate for whites selected, the employer would have to hire 20 of the 40 blacks.

The employer may try to explain the disparity, for example, by arguing that most of the black applicants are still in school and too young to be hired.

In an interview Mr. Thomas, the chairman of the equal employment commission, said the review of the guidelines was "the No. 1 item on my agenda."

We at the commission have applied the 80 percent rule too rigidly, too inflexibly," Mr. Thomas said, "and we have an obligation to go back and correct it.'

He said the agency had relied too heavily on statistics in investigations initiated by the commission itself and in its review of complaints filed by individuals. For example, he said, a case filed by the commission in 1979 against Sears, Roebuck & Company, still pending in a Federal court, "relies almost exclusively on statistics" to show discrimination against women.

* * * * * * *

Mr. Thomas and business organizations said the "80 percent rule" had been intended merely as a guide, but that it was applied in practice as a rigid standard. Since he took office in May 1982, Mr. Thomas said, he has been troubled by the use of statistics in 50 to 100 cases.

STATISTICS 'TERRIBLY OVERUSED'

"It's not that statistics are bad," Mr. Thomas said, "but they have been terribly overused. Every time there is a statistical disparity, it is presumed there is discrimination." In fact, he said, the disparity is often explained by other factors such as culture, educational levels, "previous events" or commuting patterns.

Civil rights groups said courts had usually insisted on further evidence to show that statistical disparties were substantial and real, not random or accidental, before deciding whether an adverse effect exists.

Linda Chavez, staff director of the Civil Rights Commission, said the guidelines needed to be changed because they put pressure on employers "to eliminate valid tests in favor of quota selection."

She asserted that "the guidelines actually handicap the employer searching for qualified individuals by forcing him to think in terms of race."

The use and misuse of racial statistics has become a major issue in civil rights debates. In a new book, Thomas Sowell, the economist, condemned the notion that "statistical disparties imply discrimination." In fact, he said, such disparities are "commonplace among human being" for "many historical and cultural reasons."

MORE EMPHASIS ON CONDUCT

Mr. Thomas said he did not flatly oppose all use of statistical evidence. But he said there should be less reliance on statistics and more use of other forms of evidence based on actual conduct, such as oral testimony from witnesses telling "what happened to me." Other acceptable evidence, he said, would include a company's statements of hiring policy or height and weight requirements that excluded women.

* * * * * *

In addition, companies contend that the guidelines have hampered productivity by discouraging the use of tests and making it more difficult for them to identify the best-qualified applicants.

Supporting this argument, Frank L. Schmidt, a research psychologist at the Federal Office of Personnel Management, said: "A major reason for the marked decline in U.S. productivity growth in the last few years is the decline in the accuracy with which employers have been sorting people into jobs. This decline in accuracy is caused by substantial reductions in the use of valid job aptitude tests."

CHANGES IN THEORY ON TESTS

Mr. Schmidt said the Federal guidelines incorporated many "false theories" about industrial psychology and the cultural bias of tests. "The theories may have been plausible in 1978, but have since been discredited," he said.

A scientific committee of the American Psychological Association has called for revision of the guidelines, saying they did not reflect the latest research on psychological testing.

Prof. Wayne F. Cascio, a psychologist at the University of Colorado, said the guidelines now required that each of two cities using the same test to select bus drivers must do separate studies to show the test accurately forecasts job performance. Recent research, he said, indicates that only one study is needed if the jobs in the two cities are similar.

Another expert on psychology and testing, Prof. Fritz Drasgow of the University of Illinois at Urbana-Champaign, said: "The guidelines are somewhat out of date, but given the Reagan Administration's record on civil rights, I would be very concerned about any revision. I'm afraid that many of the strides made toward equal employment opportunity would be lost because of political decisions rather than scientific evidence."

Civil rights groups said the type of changes contemplated by the Administration would reverse two decades of progress toward greater employment opportunities for women and minorities.

Richard T. Seymour of the Lawyers Committee for Civil Rights Under Law said: "The review of the guidelines is undesirable and unnecessary and will sow a lot of needless confusion. The Administration is wasting its energies pursuing far-fetched ideas without much basis in law or reality. The attack on testing standards and the use of statistics seeks to overturn 20 years of policy positions accepted by two Republican and two Democratic administrations, by the courts and by Congress."

Barry L. Goldstein, a lawyer at the NAACP Legal Defense and Educational Fund Inc., said statistical evidence was essential in many job discrimination cases. Moreover, he said, "There is no basis for questioning its use."

Tony E. Gallegos, a member of the Equal Employment Opportunity Commission, said the guidelines could be made more understandable and "less burdensome for employers."

In recent years, the commission has sought to remedy civil rights violations by encouraging employers to set numerical goals and timetables for hiring black, female and Hispanic workers. But in the interview, Mr. Thomas said it was essential to find other, more creative and effective remedies.

For example, he said, the commission might ask a Federal judge to remove the personnel director of a company found to have engaged in discrimination. "The people who put in place the discriminatory personnel practices should be removed from office," he said. "The company should bring in new people."

Civil rights lawyers expressed skepticism about this approach, saying they knew of no precedents or legal basis for it. Mr. Thomas said he was not sure whether the remedy was authorized by Federal law but would "explore it."

The chairman also said recent decisions of the Supreme Court may have "drawn into question" landmark rulings in cases such as Griggs v. Duke Power Company, decided in 1971. In that case, the Court said that even in the absence of discriminatory intent, a job test, that had the effect of excluding blacks was prohibited unless it was clearly related to job performance.

Attachment B—Outline of Issues for the UGESP Review (EEOC Document)

OUTLINE OF ISSUES FOR THE UGESP REVIEW

I. Necessity and purpose

A. Should there be Guidelines?

1. Is it appropriate or even possible to provide standardized guidance to different types of employers (e.g., governmental and private employers).

2. Could guidance be provided through the compliance manual?

3. Through the opinion letter process?

B. What is the purpose of the Guidelines?

1. To summarize case law? if so, why is this necessary?

2. To fill in the gaps in the court decisions?

3. To point the user in a particular direction?

C. Should the guidelines cover the ADEA?

II. Adverse impact

A. What is the basis for assuming that discrimination occurs if the selection rates vary among groups, without reference to any other difference in characteristics among the groups (e.g., prior experience, or other differences in age, education etc.).

1. Should an employer's selections be expected to mirror the pool of applicants?

2. Is the premise underlying underrepresentation valid for some jobs and not for others, e.g., for unskilled workers, but not for highly specialized professionals?

B. Statistical approaches to proving discrimination

a. What assumptions underly an 80% rule?

b. What is its reliability? Does it under-or overdetect? Would a test of statistical significance be preferable?

C. Legal Analyses

1. Was intent shown in *Griggs*? If so, why was an impact analysis necessary?

2. Has the holding in *Griggs* been eroded by *Stotts*?

3. To what extent is an impact standard consistent with § 1981? With the 14th Amendment? Should it be?

4. Should employers bear the burden of seeking less discriminatory procedures? Is this subject to a cost defense?

III. Test validity

A. Should the Commission take a position on acceptable methods of test validation?

B. If so, should it adopt the standards of the APA in their entirety (Determine whether other federal agencies incorporate the standards of similar private entities into their regulations or directives)?

C. Do other professionally acceptable standards or approaches to test validity exist?

D. Can determinations of test validity be made through the use of expert testimony on a case-by-case basis?

E. Should employers be permitted to transport evidence of validity from one user to another?

UGESP Workplan

6c

IIIA			Oct. 10
		IA	Oct. 17
IIIB	IIA IIC1		Oct. 24
IIIC		IB	Nov. 7
IIID	IIB IIC4		Nov. 21
IIIE		IC	Dec. 5

Final Drafts Due Dec. 12

Final Drafts to Chief of Staff Dec. 21

[From the Washington Post, Dec. 4, 1984]

ATTACHMENT C.—EEOC CHIEF CITES ABUSE OF RACIAL BIAS CRITERIA

(By Juan Williams)

The chairman of the Equal Employment Opportunity Commission said in an interview yesterday that a 1971 Supreme Court case allowing the use of racial percentages in judging discrimination has been "overextended and over-applied."

EEOC Chairman Clarence Thomas said the decision has been blacks and women be hired in proportion to their numbers in the work force.

The EEOC has been reviewing federal discrimination guidelines for the last three months.

There are legitimate "race-neutral" job requirements, such as educational tests and strength tests, that might fairly and unintentionally act to limit the percentage of women or any one racial or ethnic group at a job site, Thomas said.

He also endorsed the Reagan administration's position that finding of discrimination and remedies for discrimination should be limited to individuals who have been victims and not extended to "all blacks or all women because an individual has suffered discrimination."

"I'm not saying *Griggs* [*v. Duke Power Company*] is bad law," Thomas said. "In that case they were asking that workers have a high school diploma to dig ditches. But the way Griggs has been applied has been overextended and over-applied. You get people now saying if you don't have a certain number of women or blacks on the job then you are guilty of discriminating . . . if it's an engineering job and you don't have a certain number of blacks because few blacks have engineering degrees there are people who want to ask if you . . . . That's going too far."

The decision has been interpreted to mean that a company abiding by anti-discrimination laws should have approximately the percentage of minority workers in there are minorities in the "relevant workforce"—minus 20 percent.

Thomas, whose agency voted in September to review affirmative action guidelines as well as federal government guidelines for hiring, said recent Supreme Court decisions, such as the Memphis firefighter case in which the court ruled that whites with senority should not be laid-off before more-recently hired blacks to preserve racial balance, are evidence that the court has "modified Griggs."

Barry L. Goldstein, a lawyer at the NAACP Legal Defense and Education Fund Inc., said the Griggs case was the "foundation of antidiscrimination law" in hiring.

"Why the bureaucracy would call into question a principle established by the Supreme Court when they have no particular case to do so I don't understand," said Goldstein.

ATTACHMENT D—DAILY LABOR REPORT No. 221, NOVEMBER 15, 1984

POLICY CHANGES COMING AT EEOC, THOMAS ASSERTS

Chairman Thomas says EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmative action—favoring victim-specific remedies and moving away from quotas and proportional representation in both its conciliation efforts and court-approved settlements. But the move in that direction, he quickly adds in a BNA interview, does not mean the Commission's enforcement efforts will be slowing down during the President's second term—only that the agency will be speaking with one voice, and will be looking to new "more aggressive" remedies for discrimination.

The equivocation that plagued EEOC during the President's first term, with White House appointees expressing the Administration's position but career bureaucrats continuing their traditional approach to civil rights enforcement, will be changing as the commissioners take a more active role in policy development and day-to-day activities, Thomas asserts. "We aren't saying we have all the answers," he says. "But we're saying we're the commissioners now." In the future, he says, the five-member panel will work to see that the agency's mandate is carried out in the field and that its policy—"not filtered and translated"—is followed by Commission staffers.

Along with changes in its approach to remedies, Thomas says, EEOC plans early action on pension accrual, uniform testing guidelines, and affirmative action regulations for federal agencies. "I look at this as a four-year proposition," the chairman adds. "In four years, we can do a hell of a lot."

POLICY CHANGES, AGGRESSIVE ENFORCEMENT, WILL MARK NEXT TERM AT EEOC, THOMAS SAYS

EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmation action—favoring victim-specific remedies and moving away from quotas and proportional representation in both its conciliation efforts and court-approved settlements—Chairman Clarence Thomas says.

But the move in that direction, he quickly adds in a BNA interview, does not mean the Commission's enforcement efforts will be slowing down during the President's second term—only that the agency will be speaking with one voice. The major White House tenents on equal employment opportunity have been consistent—there should be no preferential treatment based solely on class membership; relief should be victim specific; and "affirmative action" should consist of outreach efforts rather than numerical goals and timetables. But despite the uniform philosophy, the scope of its application during the President's first term has varied greatly among the three government agencies involved in EEO.

At the Department of Justice, Assistant Attorney General William Bradford Reynolds quickly established himself as one of the Administration's most vocal supporters and moved toward pushing the new, conservative approach to civil rights in public sector litigation.

But at the Department of Labor and at EEOC, the mood was a more cautious—and more equivocal—one, with White House appointees expressing the Administration's position but career bureaucrats continuing their traditional approach to enforcing civil rights laws.

The Labor Department's Office of Federal Contract Compliance Programs changed some internal procedures and began a tentative move toward negotiating voluntary agreements with major corporations. But the agency continued to waffle over its biggest task—issuing revised affirmative action regulations setting out requirements for federal contractors. Some observers are suggesting that the four-year-effort at changing the regulations may be junked entirely during the President's second term.

A similar state of equivocation plagued the government's major civil rights enforcement agency—EEOC—during the first four Reagan years. While Chairman Thomas was expressing his personal philosophy against quotas and numerical remedies, the agency's foot soldiers—the compliance personnel and attorneys in the field—continued to negotiate settlements and to go to court seeking the same goals and timetables they have always sought.

New activism by Commissioner due

This disjointed approach will be changing during the next four years, Thomas said, as the commissioners take a more active role in policy development and day-today activities.

"I don't appreciate reading in the paper that [EEOC] agreed to some settlement with quotas in it," he told BNA. In the future, the five-member Commission will be working to see that its philosophy is carried out in the field and that its policy—"not filtered and translated"—is carried out by Commission staffers.

"We aren't saying we have all the answers, but we're saying we are the commissioners now—we want to have an intelligent review of our internal rules and guidelines and regulations. And we intend to do that in an intelligent, logical, rational, careful, professional way," he said.

A harbinger of this more activist approach surfaced last month, when commissioners voted to reexamine the long-held requirement that Federal Government agencies submit numerical goals and timetables as part of the multi-year affirmative action plans they must submit to EEOC (1984 DLR 201: A-8). It was a "logical time" to review the requirement, since the directive will be expiring shortly, Thomas said, and this approach of reexamining the necessity of goals and timetables is likely to be extended to the private sector soon.

"We're going to look at [the federal management directive] from top-to-bottom. The use of proportional representation just doesn't comport with reality. You can't have a situation where—because you are a member of a particular race or group—you are entitled to certain preferences. I don't think that's an appropriate approach from a policy standpoint," he said. "We're going to see similar thinking in the private sector."

More effective remedies

Thomas denies that the "victim-specific" approach to remedies will lessen the effectiveness of the agency as an enforcer of nondiscrimination. "People have tended to take comfort in these numbers [goal and timetable requirements]," he contended. "They think that somehow hiring by these numbers—even without any oversight or monitoring—enough was being done. I think that's baloney."

Instead, Thomas said, the agency will be looking at new remedial approaches. The Commission will do "more careful analysis" before bringing suit, to ensure that the kind of remedies that are sought are more effective ones, he added.

"We're talking about things we can monitor," he said. "Like taking action against those who were responsible. We're going to start pushing in court for remedies against those individuals. For example, remove the head of the personnel office. Bring in new people. Actual changes."

Changes in pension, testing rules

Proposed regulations requiring pension accrual for employees working beyond age 65 are likely to be issued by the Commission early next year, after some "glitches" in an internal analysis are ironed out, according to the chairman.

Last June the Commission proposed to consider rescinding a longstanding Labor Department rule that permits employers to stop making pension plan contributions on behalf of workers who reach normal retirement age and to propose rules that make such contributions mandatory under the Age Discrimination in Employment Act (1984 DLR 124: A-6).

"If the pieces fall into place in a reasonably good way," Thomas suggested, final regulations are likely to be issued within a year.

Another set of regulations that are likely to be changed are the Uniform Guidelines on Employee Selection Procedures—a massive and complicated set of regulations issued by four federal agencies in 1978, aimed at providing guidelines for avoiding discrimination in testing and explaining the government's interpretation of validation standards.

There is a good possibility that the guidelines will be subject to "significant changes," said Thomas, adding that he has had "a lot of concern" about the regulations as they now stand. Sources have indicated that one of the major moves in any new proposals will be to sever the input the American Psychological Association historically has had in issuing the earlier regulations.

A 4-year job

The 37-year-old Republican says he has learned to take criticism—particularly from the civil rights interest groups—in stride after heading the agency for nearly three years. "We think we've run the Commission in a responsible way," Thomas said. "Our track record speakes for itself. Our efforts have always been consistent with our oaths to enforce the civil rights laws, and we defy anyone to show us differently. They may disagree with us, they may not like my management style or my party affiliation, but we defy them to show us where we have taken any effort to undermine civil rights."

Although his term expires in July 1986, Thomas said he's planning a four-year agenda for the Commission. "We'll go on in our own quiet, methodical way," he said. "I don't think we have to convince ourselves with rhetoric." The chairman added: "My term expires in a year and a half, but if things work out, I'll probably be here a while longer. I just look at this as a four-year-proposition and keep moving. In four years, we can do a hell of a lot."

ATTACHMENT E.—LETTER, CHAIRMAN THOMAS TO ATTORNEY GENERAL SMITH, APRIL 5, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, DC, April 5, 1983.

Re *Williams* v. *City of New Orleans* (5th Cir. No. 82-3435).

Hon. WILLIAM FRENCH SMITH,
Attorney General of the United States,
Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL SMITH: Today the Commission voted to withdraw the authorization by which its General Counsel would have petitioned the Fifth Circuit for leave to participate as amicus curiae in *Williams* v. *New Orleans*. In so doing, the Commission noted that the United States has already intervened as a party in the referenced case, and that you have certified that this is a case of general public importance in accordance with the provisions of Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended.

We agree that this is a case of general public importance. Further, since it is your stated intention to file a brief in this case which would addresss the issues in a manner contrary to the position this Commission would have taken and because of the EEOC's responsibility for enforcing Title VII, we are forwarding to you the Commission's analysis of the issues raised by this case for your consideration as the Department develops its brief.

As I summarized in an earlier letter to you, the Civil Rights Division of the Department of Justice intervened in *Williams* following the Fifth Circuit panel decision reversing a district court's refusal to approve an employment discrimination case consent decree containing race-conscious promotion goals that would inure to the benefit of black police officers who may not have been actual victims of past discriminatory practices. The Department of Justice's accompanying brief urges the Fifth Circuit in en banc rehearing to vacate that panel ruling and hold that federal courts are prohibited both by Title VII and by Constitutional equal protection guarantees from approving or granting such relief in any Title VII case.

Specifically, the Department of Justice has suggested that the last sentence of Section 706(g) of the Title VII (42 U.S.C. 2000e-5(g)) expressly prohibits courts from ordering any affirmative relief that benefits persons who were not actual victims of an employer's unlawful employment practice. That sentence provides that: "No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . . ."

Additionally, the Department of Justice has suggested that Constitutional equal protection guarantees prohibit such race-conscious relief because of the absence of any compelling governmental interest in benefiting nonvictim minority employees to the possible detriment of innocent nonminority employee expectations.

Upon learing of the Department of Justice's position in the *Williams* case, the Equal Employment Opportunity Commission became very concerned about the serious impact that position would have, if adopted, both on Commission policy and on cases in which the Commission is a party. For example, if the the Department of Justice's position were to become law, it might well invalidate innumerable conciliation agreeements, consent decrees, and adjudicated decrees to which the Commission is a party, as well as the Commission's own published guidelines regarding appropriate affirmative action under Title VII (29 C.F.R. Part 1608 (1982)). Similarly, that position also would affect the Commission's current efforts to obtain affirmative action remedies in pending conciliations and litigation. Finally, the Commission was concerned with the breadth of the Department of Justice's position. Because that position would prohibit court-sanctioned affirmative relief whenever the relief would benefit persons who were not actual victims of past discriminatory practices, the position not only would invalidate the promotion goals at issue in the *Williams* case, it also would invalidate most other court-sanctioned prospective affirmative action—whether in recruitment, training, or hiring, and regardless of the vastly diminished impact of these latter remedies on the legitimate expectations of innocent nonminority employees.

For these reasons, the Commission undertook its own review of the position proposed by the Department of Justice in *Williams*. As I indicated above, the Commission reached diametrically opposite conclusions with regard to both the statutory and constitutional components of the Department of Justice's position. Specifically, following an exhaustive review of both the 1964 and 1972 legislative histories of Section 706(g) of Title VII, the Commission found no support for the notion that Section 706(g) was intended to prohibit court-sanctioned affirmative action that would inure to the benefit of persons who were not victims of an employer's past discriminatory practices. Rather, both the 1964 and 1972 legislative histories indicate quite clearly that the final sentence of Section 706(g) was intended simply to emphasize that an employment decision would not be unlawful under Title VII if it was predicated on a reason other than race, color, religion, sex, or national origin. Additionally, Congress actually broadened the remedial provisions of Section 706(g) in 1972 by specifying in that section that "affirmative action" relief "is not limited to" the examples stated in that section, and by stating expressly that a district court could award "any other equitable relief as the court deems appropriate." Finally, and in that same year, Congress rejected by a two-to-one margin an amendment to Title VII that would have prohibited the EEOC and all other federal agencies from requiring employers to adopt numerical goals with regard to the employment of minorities. Notably, Senator Javits led the debate against that amendment by citing federal court cases approving the use of prospective race-conscious employment goals (118 Cong. Rec. 1663-64 (1972)), and the Conference Committee report discussing the 1972 amendments to Title VII noted that, "it was assumed that the case law as developed by the courts would continue to govern the applicability and construction of Title VII." (118 Cong. Rec. 7166 (1972)).

The Commission also reached an opposite conclusion with regard to the Department of Justice's Constitutional equal protection argument. Briefly, the Commission's basic difference with the Department of Justice's position concerns the identity of the "interest" courts vindicate when approving prospective race-conscious affirmative relief. As I noted above, the Department of Justice contends that there can be no compelling governmental interest in benefiting nonvictim minority employees to the possible detriment of innocent nonminority employees. The Commission believes, however, that that contention is not a proper statement of the governmental interest pursued by courts in approving affirmative action relief. Rather, the Commission believes that the interest served by court-sanctioned affirmative relief in Title VII cases is the express Congressional objective of eradicating the effects of past discrimination and integrating traditionally segregated workforces. The Commission believes that several Supreme Court cases confirm that this interest is sufficiently compelling to justify such relief, and that other Supreme Court cases make clear that as long as such relief is responsive to a probable pattern or practice of discrimination, an express employer admission of discrimination is not a necessary predicate to such relief. Thus, the Commission believes that Constitutional equal protection guarantees do not prohibit prospective affirmative action relief despite the fact that the incidental beneficiaries of such relief often may not have been actual victims of past discriminatory practices.

The Commission strongly urges you to consider the foregoing views in developing your brief in this case and in formulating future Department of Justice policy in this area. Should the Department of Justice decide not to change its position substantially, the Department's brief should indicate the difference between its position and that of the Commission.

Sincerely,

CLARENCE THOMAS, *Chairman.*

Enclosure.

ATTACHMENT F.—LETTER, CHAIRMAN THOMAS TO ATTORNEY GENERAL SMITH, MARCH 21, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, DC, March 21, 1983.

Re *Williams* v. *City of New Orleans* (5th Cir. No. 82-3435).

Hon. WILLIAM FRENCH SMITH,
Attorney General of the United States,
Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL SMITH: The Office of Legal Counsel of the Department of Justice recently issued an opinion to Assistant Attorney General Wm. Bradford Reynolds regarding the authority of the Equal Employment Opportunity Commission to participate as amicus curiae in *Williams* v. *City of New Orleans* (5th Cir. No 82-3435). That opinion suggest that the Commission lacks authority to participate in *Williams* in the absence of the Attorney General's consent. Although the Commission's own opinion regarding its amicus participating authority is not identical to that reached by the Office of Legal Counsel, I do feel in light of the significance of the *Williams* case that the Commission should solicit your personal consideration of this matter.

On January 7, 1983, the Civil Rights Division of the Department of Justice intervened in *Williams* following a Fifth Circuit panel decision reversing a district court's refusal to approve an employment discrimination case consent decree containing race-conscious promotion goals that would inure to the benefit of black police officers who may not have been actual victims of past discriminatory practices. The Civil Rights Division's accompanying brief urges the Fifth Circuit in *en banc* rehearing to vacate that panel ruling and hold that federal courts are prohibited both by Title VII and by Constitutional equal protection guarantees from approving or granting such relief in any Title VII case.

Specifically, the Civil Rights Division has suggested that the last sentence of Section 706(g) of Title VII (42 U.S.C. 2000e-5(g)) expressly prohibits courts from ordering any affirmative relief that benefits persons who were not actual victims of an employer's unlawful employment practice. That sentence provides that:

"No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. . . ."

Additionally, the Civil Rights Division has suggested that Constitutional equal protection guarantees prohibit such race-conscious relief because of the absence of any compelling governmental interest in benefiting nonvictim minority employees to the possible detriment of innocent nonminority employee expectations.

Upon learning of the Civil Rights Division's position in the *Williams* case, the Equal Employment Opportunity Commission became very concerned about the serious impact that position would have, if adopted, both on Commission policy and on cases in which the Commission is a party. For example, if the Civil Rights Division's position was to become law, it might well invalidate innumerable conciliation agreements, consent decrees, and adjudicated decrees to which the Commission is a party, as well as the Commission's own published guidelines regarding appropriate affirmative action under Title VII (29 C.F.R. Part 1608 (1982)). Similarly, that position also would affect the Commission's current efforts to obtain affirmative action remedies in pending conciliations and litigation. Finally, the Commission was concerned with the breadth of the Civil Rights Division's position: because that position would prohibit court-sanctioned affirmative relief whenever the relief would benefit persons who were not actual victims of past discriminatory practices, the position not only would invalidate the promotion goals at issue in the *Williams* case, it also would invalidate most other court-sanctioned prospective affirmative action—whether in recruitment, training, or hiring and regardless of the vastly diminished impact of these latter remedies on the legitimate expectations of innocent nonminority employees. Thus, even in cases where a long-continued and egregious pattern of discrimination has been proven or shown to be probable, the position would prohibit the courts from responding with broad remedial prospective relief, and thereby limit remedies even for systemic Title VII violations to the more limited "make whole" remedies characteristic of single-plaintiff lawsuits.

For these reasons, the Commission undertook its own review of the position proposed by the Civil Rights Division in *Williams*. As I indicated above, the Commission reached opposite conclusions with regard to both the statutory and constitutional components of the Civil Rights Division's position. Specifically, following an exhaustive review of both the 1964 and 1972 legislative histories of Section 706(g) of Title VII, the Commission found no support for the notion that Section 706(g) was intended to prohibit court-sanctioned affirmative action that would inure to the benefit of persons who were not victims of an employer's past discriminatory practices. Rather, both the 1964 and 1972 legislative histories indicate quite clearly that the final sentence of Section 706(g) was intended simply to emphasize that an employment decision would not be unlawful under Title VII if it was predicated on a reason other than race, color, religion, sex, or national origin. Additionally, Congress actually broadened the remedial provisions of Section 706(g) in 1972 by specifying in that section that "affirmative action" relief "is not limited to" the examples stated in that section, and by stating expressly that a district court could award "any other equitable relief as the court deems appropriate." Finally, and in that same year, Congress rejected by a two-to-one margin an amendment to Title VII that would have prohibited the EEOC and all other-federal agencies from requiring employers to adopt numerical goals with regard to the employment of minorities. Notably, Senator Javits led the debate against that amendment by citing federal court cases approving the use of prospective race-conscious employment goals (118 Cong. Rec. 1663-64 (1972)), and the Conference Committee report discussing the 1972 amendments to Title VII noted that, "it was assumed that the case law as developed by the courts would continue to govern the applicability and construction of Title VII." (118 Cong. Rec. 7166 (1972)).

The Commission also reached an opposite conclusion with regard to the Civil Rights Division's Constitutional equal protection argument. Briefly, the Commission's basic difference with the Civil Rights Division's position concerns the identity of the "interest" courts vindicate when approving prospective race-conscious affirmative relief. As I noted above, the Civil Rights Division contends that there can be no compelling governmental interest in benefiting nonvictim minority employees to the possible detriment of innocent nonminority employees. The Commission believes, however, that that contention is not a proper statement of the governmental interest pursued by courts in approving affirmative action relief. Rather, the Commission believes that the interest served by court-sanctioned affirmative relief in Title VII cases is the express Congressional objective of eradicating the effects of past discrimination and integrating traditionally segregated workforces. The Commission believes that several Supreme Court cases confirm that this interest is sufficiently compelling to justify such relief, and that other Supreme Court cases make clear that as long as such relief is responsive to a probable pattern or practice of discrimination, an express employer admission of discrimination is not a necessary predicate to such relief. Thus, the Commission believes that Constitutional equal protection guarantees do not prohibit prospective affirmative race-conscious relief despite the fact that the incidental beneficiaries of such relief often may not have been actual victims of past discriminatory practices.

While the Commission's legal conclusions on these issues are contrary to those reached by the Civil Rights Division, I believe that the Commission for the most part does share what appears to be the principal concern underlying the Civil Rights Division's position; namely, the unfortunately divisive effect of mandated race-conscious activity in the workplace. However, instead of adopting the prohibitory position proposed by the Civil Rights Division, the Commissioner's legal position reiterates that precisely because all race-conscious remedial activity by federal courts does represent an extraordinary remedy, such remedies must be cautiously approached and approved only after a thorough assessment by the district court of the remedy's necessity. Consequently, the Commission believes that equitable considerations require a district court to consider the efficacy of alternative remedies, the planned duration of the proposed remedy, the effect of the remedy on innocent third parties, and the availability of waiver provisions, before the court may approve or award any race-conscious affirmative relief.

Because of the importance of these issues to the Commission's activities, and because of the Commission's differences with the Civil Rights Division on these issues, the Commission determined that it should make its views known to the Fifth Circuit by participating as amicus curiae in the *Williams* case. Although the Commission's position in this regard unfortunately will result in a public difference of opinion between the Civil Rights Division and the EEOC, I do believe that considerable public benefit will result from squarely joining these important legal issues for consideration by the Fifth Circuit. Moreover, and as I mentioned above, the Commission respectfully disagrees with the Office of Legal Counsel memorandum suggesting the absence of EEOC authority to participate in *Williams.*[1] Nonetheless, I assure you that the Commission also for the most part appreciates the appropriateness of the Executive Branch speaking with a unified voice on complex legal issues of major public importance, and it is in that spirit that I am submitting the Commission's views to you in advance of the Commission's participation in the *Williams* case.

I would welcome the opportunity for the Commission's General Counsel, David L. Slate, and I to meet with you at your earliest convenience to discuss this matter.

Very truly yours,

CLARENCE THOMAS,
Chairman,
Equal Employment Opportunity Commission.

ATTACHMENT G.—LETTER, EEOC COMMISSIONERS TO ATTORNEY GENERAL SMITH, JANUARY 26, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, DC, January 26, 1983.

Re *Williams, et al* v. *City of New Orleans* (5th Cir. No. 82-3435).

Hon. WILLIAM FRENCH SMITH,
Attorney General of the United States,
Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL SMITH: The members of the Equal Employment Opportunity Commission strongly protest the action of your Department in filing a Motion To Intervene and Petition Suggesting Rehearing En Banc in the above-styled case.

We find the action unacceptable because the Equal Employment Opportunity Commission was neither notified nor consulted before the Department of Justice took a position in a brief which represents a radical departure from prior Department of Justice and current Equal Employment Opportunity Commission policy.

Without commenting on the merits of the position taken in the brief, we feel that the Department's attempt to initiate a major and, as it turned out, newsworthy change in the government's Civil Rights policy, without even consulting the Equal Employment Opportunity Commission, constitutes not only a sharp departure from acceptable standards of inter-agency protocol but was an action taken in derogation of this agency's statutory designation as the chief interpreter of Title VII of the Civil Rights Act of 1964, as amended.

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[1] The Office of Legal Counsel memorandum suggests two principal reasons in support of its conclusion that the Commission may not participate as amicus curiae in the *Williams* case. First, the memorandum suggests that because the Department of Justice and not EEOC has authority to initiate litigation in public sector employment discrimination cases, the EEOC may not participate in any manner in such cases. Second, the memorandum suggests that Executive Order 12146 compels the submission to the Attorney General of all legal disputes between Executive agencies.

The Commission respectfully disagrees with these conclusions. Although the Commission admittedly is without authority to initiate or intervene in public sector employment discrimination cases, its authority to participate as amicus curiae in such cases has never before been challenged. Indeed, since 1964 the Commission has enjoyed the express statutory authority to direct its attorneys to "appear for and represent the Commission in any case in court, [except the Supreme Court]" (42 U.S.C. § 2000e-4 (b)(2) (emphasis added)), and this authority has, in fact, been exercised in public sector employment discrimination cases many times in recent years. Moreover, although Executive Order 12146 does require that legal disputes between Executive agencies be submitted to the Attorney General prior to proceeding in any court (as the Commission now is doing), that Order excepts from that requirement any dispute for which there is "specific statutory vesting of responsibility for a resolution elsewhere." Executive Order No. 12146 (July 18, 1979), reprinted at 28 U.S.C., § 509, Supp. V, 1981. As you know, Section 715 of Title VII expressly provides that the EEOC "shall have the responsibility for developing and implementing . . . policies and practices designed to . . . eliminate conflict . . . and inconsistency among . . . the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." (42 U.S.C. § 2000e-14). The Office of Legal Counsel memorandum omits mention of these two important facts.

The Equal Employment Opportunity Commission is the "principal Federal agency in fair employment enforcement." (Presidential message transmitting Reorganization Plan No. 1 of 1978, 92 Stat. 1981, to Congress). In enforcing Federal fair employment laws, the Commission is charged with the responsibility for "eliminat[ing] conflict . . . and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation . . . of equal employment legislation, orders and policies." (See § 715 of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e–14, as modified by Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and Executive Order No. 12067, 43 Fed. Reg. 28967 (1978)). Under Title VII of the Civil Rights Act of 1964, as amended, the Commission is also responsible for initiating civil actions against private employers who violate Title VII and for initiating conciliation efforts designed to persuade public employers to voluntarily comply with Title VII. (See § 706(f)(1) of Title VII, 42 U.S.C. 2000e–5(f)(1)). Many of our lawsuits and conciliations under Title VII have resulted in the adoption and implementation of affirmative action goal relief programs which are currently being monitored and enforced by the Commission.

The Justice Department's brief, however, urges the Court of Appeals to reverse a panel decision by an *en banc* ruling on the ground that Title VII flatly prohibits courts from awarding any affirmative action relief which benefits individuals who were not specific victims of discrimination. This interpretation of Title VII is the direct opposite of the interpretations previously urged by both the Department of Justice and the Equal Employment Opportunity Commission. If this position is adopted by the courts, it could seriously affect our ability to enforce many existing judgments, consent decrees and settlement agreements entered into between this agency and employers over the last 11 years. A change in position of this magnitude clearly should have been discussed with the agency charged with the coordination and enforcement of Title VIII.

Every member of the Commission finds this unilateral action by the Department of Justice deplorable. While we are aware that you may not have been informed about either the interest or role of the Commission in interpreting the Title VII responsibilities of state and municipal employers, we urge that you review and reconsider the Department of Justice procedures which permit such a serious breach of protocol to occur.

Sincerely,

CLARENCE THOMAS,
Chairman.
CATHIE A. SHATTUCK,
Vice Chairman.
ARMANDO M. RODRIGUEZ,
Commissioner.
TONY E. GALLEGOS,
Commissioner.
WILLIAM A. WEBB,
Commissioner.

ATTACHMENT H.—*BRATTON* v. *CITY OF DETROIT*, No. 80-1837 *(ORDER ENTERED MAY 27, 1983)*

No. 80-1837

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HANSON BRATTON, et al., PLAINTIFFS-APPELLANTS,

and

UNITED STATES OF AMERICA, APPLICANT FOR INTERVENTION,

v.

THE CITY OF DETROIT, MICHIGAN, DEFENDANTS-APPELLEES,

and

GUARDIANS OF MICHIGAN, et al., INTERVENING DEFENDANTS-APPELLEES.

ORDER

Before MERRITT and JONES, Circuit Judges, and CELEBREEZE, Senior Circu Judge

The United States of America, through the Civil Rights Division of the Justice Department, has requested leave to intervene as a party appellant and to file a suggestion of rehearing *en banc* in excess of the normal page limit. The City of Detroit, defendants-appellees, and the Guardians of Michigan, intervening defendants-appellees, have filed oppositions to that request. Upon consideration of all issues raised, arguments presented and interests claimed, we find that the government's interest can be adequately protected via participation as an *amicus curiae* and that the interests of all others involved, including the Court, will be best served by a denial of the request to intervene at this late date. Accordingly, while the United States is free to request the right to file an *amicus* brief with this Court if and when a rehearing of this cause should occur, the motion to intervene as a party appellant is hereby DENIED.

The issues in this case have been fully and quite competently briefed and argued by the parties involved, including parties who sought, and were granted, the right to intervene at a much earlier time. Those issues have been carefully considered by this panel and a petition for rehearing and/or rehearing *en banc* is now pending before the panel and the full Court, respectively. There is no reason to believe that the presence of a new party is required at this point for the Court to be capable of a proper resolution of the issues it has already begun to consider.

A prior panel was faced with many of the same consideration in *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). In fact, the affirmative action analyzed in *Young* arose out of the *very same plan* the Court has been asked to review in the present case. In *Young*, the Justice Department joined in an *amicus* brief filed by the Equal Employment Opportunity Commission requesting that the plan be upheld in the face of challenges under Title VII and the Fourteenth Amendment. The government's interest was then fully considered. The panel majority in this case specifically followed the standards set out in *Young*. If the government wishes to argue that it position has somehow shifted since the *Young* decision, surely that can be accomplished by virtue of another *amicus* presentation to the Court, as was permitted in *Young* and has recently been permitted by the Supreme Court in *Boston Firefighters Local Union No. 718* v. *Boston Chapter, NAACP* (S.Ct. Nos. 82-185, 82-246, 82-259).

The harm to the parties opposed to the government's intervention, and the harm to the proper administration and disposition of such a major suit, so long pending before this Court, simply outweighs any claimed harm to the government's Title VII enforcement interests.[1] The plantiffs have shown a clear inclination in the past to fully and vigorously argue all relevant issues and have expressed their intention to pursue this case through all available channels, including a petition for rehearing *en banc* in this Court and an application for *certiorari* in the Supreme Court. While the government's newly-injected presence as an *amicus curiae* at those stages may prove helpful, its presence as a party at this point is unwarranted.

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[1] We note that the Justice Department's claim in this regard lacks much of the weight it might otherwise carry given the conflict between the position the Department has taken here and that taken by others vested with enforcement powers under Title VII, particularly the Equal Employment Opportunity Commission.

The United States may request the right its arguments to the Court as an *amicus curiae* if and when the full Court should deem a rehearing appropriate. The request to intervene as a party appellant and, therefore, to file a suggestion for rehearing is DENIED.

No. 80-1837

BRATTON v. CITY OF DETROIT

MERRITT, Circuit Judge, dissenting. The United States through the Attorney General has certified that this case is a civil rights case of "general public importance" under 42 U.S.C. § 2000h-2 (1976), and thus the government is entitled to intervene as a matter of right "upon timely application." The Attorney General sought to intervene under this statute a few days after receiving our Court's opinion in this case. We have uniformly permitted the United States to intervene in other civil rights cases, and I would not deny the government that right now. The government's arguments may or may not have merit, but its right to be heard seems clear. I, therefore, respectfully disagree with the opinion of the Court denying intervention.

Entered by Order of the Court
JOHN P. HEHMAN, *Clerk.*

ATTACHMENT I.—MOTION AND MEMORANDUM TO TAKE THE DEPOSITION OF CHAIRMAN THOMAS, *EEOC v. SEARS, ROEBUCK AND CO.*, C.A. No. 79-C-4373 (N.D. Ill)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF,

v.

SEARS, ROEBUCK AND CO., DEFENDANT.

Civil Action No. 79-C-4373

Judge Nordberg

MOTION FOR LEAVE TO TAKE DEPOSITION OF CLARENCE THOMAS

Sears, Roebuck and Co. (Sears), pursuant to Federal Rules of Civil Procedure 26 and 30, moves this Court for leave to take the deposition of Clarence Thomas, Chairman of the Equal Employment Opportunity Commission (EEOC). The bases for this motion, as more fully set forth in the accompanying Memorandum, are that:

1. Mr. Thomas, in his capacity as Chairman of the EEOC, recently made public statements about this case to reporters for the *New York Times* and the *Washington Post;* and

2. Mr. Thomas' statements are relevant to the EEOC's burden of proof, to the factors relied upon Sears in defense of alleged disparities in its workforce, and to Sears' entitlement to attorneys' fees.

Respectfully submitted,

ALBERT E. JENNER, Jr.,
JOHN C. TUCKER,
WILLIAM D. SNAPP,
CHARLES MORGAN, Jr.,
PAMELA S. HOROWITZ,
HOWARD T. ANDERSON,
Counsel for Sears, Roebuck and Co.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF,

v.

SEARS, ROEBUCK AND CO., DEFENDANT.

Civil Action No. 79-C-4373

Judge Nordberg

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO TAKE DEPOSITION OF CLARENCE THOMAS

Sears, Roebuck and Co. (Sears), pursuant to Fed.R.Civ.P. 26(b)(1) and 30, is entitled to take the deposition of Clarence Thomas.

In an unusual public admission, Mr. Thomas, speaking in his capacity as Chairman of the Equal Employment Opportunity Commission (EEOC),[1] cited this case as an "example" of the EEOC's excessive reliance on statistics, stating, "[A] case filed by the commission in 1979 against Sears, Roebuck and Company [sic], still pending in a Federal court, 'relies almost exclusively on statistics' to show discrimination against women." *Changes Weighed in Federal Rules on Discrimination*, N.Y. Times, Dec. 3, 1984, § A, at 1, col. 6 (*Changes Weighed*) (quoting Mr. Thomas) (Attachment A).[2]

Mr. Thomas' statements evince his personal knowledge of relevant facts concerning the EEOC's attempt to discharge its burden of proof. For this reason alone, Sears is entitled to take Mr. Thomas' deposition.[3]

Additionally, Mr. Thomas' statements are relevant to several issues which Sears intends to raise in its case in chief. Mr. Thomas, for example, recognized that a variety of factors, including cultural and educational background, may result in statistical disparities that are not illegal or discriminatory. " 'It's not that statistics are bad, . . . but they have been terribly overused. Every time there is a statistical disparity, it is presumed there is discrimination.' In fact . . . the disparity is often explained by other factors such as culture, educational levels, 'previous events' or commuting patterns." *Changes Weighed* at B10, col. 4 (quoting Chairman Thomas).

Sears expects to prove that disparities in its workforce, if any, are explained by precisely such factors, over which Sears has no control. *See* Sears' Trail Brief at 8, 9, 10-16, 21-22, 26, 55; *see also* Sears, Roebuck and Co. Offers of Proof of: Charles T. Haworth at 3-5, 7-10; Dr. Rosaline Rosenberg at 2, 4-9; Dr. Irving Crespi *passim;* Dr. Solomon Polachek *passim;* Dr. David A. Wise at 1-2; Dr. Joan G. Haworth at 11, 12 (June 1, 1984).

"Mr. Thomas said he did not flatly oppose all use of statistical evidence. But he said there should be less reliance on statistics and more use of other forms of evidence based on actual conduct, such as oral testimony from witnesses telling 'what happened to me.' " *Changes Weighed* at B10, col. 4 (quoting Chairman Thomas). The same argument is made in Sears' Trial Brief. "[T]he EEOC has been unable in this case to identify a single alleged victim of discrimination . . . . The Seventh Circuit has noted that such a deficiency is relevant . . . . Here, the need for anecdotal evidence is at its greatest because the EEOC must prove . . . a regular practice of intentional discrimination." Sears' Trial Brief at 30-35; *id.* at 5, 32, 66. Moreover, Dr. Bernard Siskin, the EEOC's chief statistical expert, addressed this point at trial, admitting that studies examining individual case or situations are more probative than statistical studies. "[C]ase studies will give a lot more information that [sic] you can in statistics . . . . You will be able to get additional information which can't be quantified. You will probably be able to make a much better decision." Transcript of Proceedings at 4252 (Dec. 7, 1984).

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[1] As Chairman of the EEOC, Mr. Thomas is charged with responsibility "on behalf of the Commission for the administrative operations of the Commission." 42 U.S.C. § 2000e-4(a). "[O]n behalf of the Commission, [he] is responsible for the implementation of Commission policy." EOC Order No. 110, at Chapter II (Aug. 17, 1982), reprinted in CCH EEOC Compl. Manual § 39.80.

[2] Mr. Thomas also made statements published in the *Washington Post*. *EEOC Chief Cites Abuse of Racial Bias Criteria*, Wash. Post, Dec. 4, 1984, § A, at 13, col. 5 (Attachment B).

[3] Taking the testimony of agency heads is appropriate when they possess personal knowledge of facts relevant to an action. *D.C. Federation of Civic Associations, Inc. v. Volpe*, 316 F.Supp. 754, 760 n.12 (D.D.C. 1970). When that testimony concerns facts pertaining to the agency head in his judicial or quasi-judicial capacity, the testimony must not delve into his mental processes. *United States v. Morgan*, 313 U.S. 409, 421-22 (1941); *D.C. Federation of Civic Associations, Inc. v. Volpe*, 316 F.Supp. at 760, n.12. Mr. Thomas' referenced statements, however, which were made publicly, do not relate to his judicial or quasi-judicial function.

"Chairman Clarence Thomas [also] said the [law] has been wrongly stretched to require that blacks and women be hired in proportion to their numbers in the workforce." *EEOC Chief Cites Abuse of Racial Bias Criteria,* Wash. Post, Dec. 4, 1984, § A, at 13, col. 5. The sole basis of the EEOC's attempt to show discrimination in Sears' hiring and promotion of commission salespersons is its assertion that hires and promotion should be proportionate to the EEOC's assumed workforce.

Had the Chairman of Sears stated that statistics alone were the proper measure of employment discrimination, that individual charges and direct testimony did not matter, and that the background, preferences, and interests of women were irrelevant, there would be little doubt that the Court, upon motion, would allow his deposition. Sears is entitled to the same opportunity in the face of statements made by the Chairman of the EEOC.

Finally, Mr. Thomas' statements are relevant to Sears' entitlement to attorneys' fees. It is apparent from his statement that this case has been litigated for two and one half years, since May 1982, despite Mr. Thomas' concern about basing cases of this type wholly on statittics. *Changes Weighed* at B10, col. 4. "[A] plaintiff should . . . be assessed his opponent's attorney's fees [if] a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 422 (1978).

Respectfully submitted,

ALBERT E. JENNER, Jr.,
JOHN C. TUCKER,
WILLIAM D. SNAPP,
CHARLES MORGAN, Jr.,
PAMELA S. HOROWITZ,
HOWARD T. ANDERSON,
Counsel for Sears, Roebuck and Co.

[From the New York Times, July 9, 1984]

ATTACHMENT J—LEADING BLACK REPUBLICANS ASSAIL REAGAN RIGHTS AIDE

(By Robert Pear)

WASHINGTON, July 8.—Many black Republican leaders who support President Reagan say they sharply disagree with the civil rights policies of his Administration, and some have urged Mr. Reagan to dismiss the Justice Department official in charge of civil rights.

Comments by the black leaders reflect the concern of some black Republicans that the Administration might try to gain support from white voters by antagonizing blacks.

Reagan campaign officials said there was no basis for such fears. But as Mr. Reagan traveled to Florida, Alabama and Texas last week, White House strategists said he was counting on a strong showing by Southern whites to help offset Democratic gains achieved through the registration of black voters, often in response to appeals by the Rev. Jesse Jackson.

Republican Party officials estimate there are are at least 900,000 black Republicans, representing 5 percent of the black population of voting age. In 1980, according to a New York Times/CBS News Poll, 82 percent of black voters supported President Carter and 14 percent backed Mr. Reagan. Last month a Times/CBS News Poll found that in a contest with Walter F. Mondale, the likely Democratic Presidential nominee, Mr. Reagan was preferred by just 5 percent of the blacks registered to vote, and 82 percent said they would vote for Mr. Mondale.

In the latest New York Times/CBS News Poll, conducted June 23 to 28, 3 percent of the 411 black respondents identified themselves as Republicans.

DISMAY OVER RIGHTS AIDE

The black leaders praised Mr. Reagan's economic policies, and many of them said they tended to oppose quotas. But they expressed dismay at recent actions and statements by William Bradford Reynolds, the Assistant Attorney General for civil rights, who has led the Administration's attack on busing for the purpose of school desegregation and on the use of quotas in education and employment.

William T. Coleman Jr., a lawyer who served as Secretary of Transportation in the Ford Administration, said in an interview: "The policies of Mr. Reynolds with regard to civil rights have been just about 100 percent wrong, and despicable. I don't think his positions are consistent with the law, with Republican Party philosophy or with the long-range interests of the country. It would be good if Mr. Reynolds were replaced."

Black Republicans were furious with the Justice Department for challenging a local ordinance that reserved some construction contracts in Dade County, Fla., which includes Miami, for bidding exclusively by blacks. In its brief last March, the Justice Department argued that the "set-asides" violated the constitutional rights of white contractors to "equal protection" of the laws. The department contended that it was improper for the county tc provide preferential treatment to a class of blacks unless each individual contractor could show he had been a victim of discrimination.

Mr. Reagan sought to undo some of the political damage on June 27 when he told minority contractors that he strongly supported "special assistance" programs for minority businesses. The Justice Department's position in the Dade County case, he said, "resulted from the technical wording of that particular ordinance." Mr. Reynolds said the local law excluded Hispanic and white business from the "set-aside" contracts.

'A MISPLACED RESPONSE'

"It's a misplaced response," Mr. Reynolds said in an interview, "to target some individual who is just carrying out the policies of the Administration and winning in court. Our positions are taken on the basis of a carefully thought our evaluation of what the law requires." He said the Justice Department had been "remarkably successful" in persuading the Supreme Court to accept its interpretation of civil rights law this year.

Many black Republicans said they were delighted to see Mr. Jackson doing better than expected in his quest for the Democratic Presidential nomitation. Some said they wish he were a Republican.

"Jesse Jackson has pulled the cover off the Democratic Party better than any black Republican could have," said LeGree S. Daniels, chairman of Black Voters for Reagan-Bush and chairman of the National Black Republic Republican Council, and adjunct of the Republican National Committee.

"His difficulties with the hierarchy of the Democratic Party show that the party is not serving the interests of black America," Mr. Daniels continued. "If the Democratic Party is so great for blacks, why does Jesse have to fight so hard to get his views onto the floor of the Democratic National Convention?"

Black Republicans said the benefits of a growing economy, especially new job opportunities, were of immense value to blacks. But they said the Republican Party was forfeiting its opportunity to capture'black votes because of the insensitivity of the Administration's civil rights policies.

'RHETORIC IS HARMING COUNTRY'

Authur A. Fletcher, a black Republican who served as an Assistant Secretary of Labor in the Nixon Administration, said: "Brad Reynolds is not doing as much for his right-wing constituents as he claim he is. He is not harming women and minorities as much as they perceive that he is. But his rhetoric is helping to polarize the country."

"It won't make for good human relations, and it will hurt Republican candidates with black voters," Mr. Fletcher continued.

Francis S. Guess, a black Republican who serves as a member of the United States Commission on Civil Rights, said he intended to campaign for Mr. Reagan's re-election. But he added: "Opposition to quotas and busing has been overemphasized. No constructive alternative has emerged from the Justice Department."

JUSTICE DEPARTMENT ASSAILED

Clarence Thomas, a black Republican who is chairman of the Equal Employment Opportunity Commission, said: "There is a very strong perception that the Justice Department has been too aggressive on busing and quotas and has set a negative rather than a positive agenda on civil rights."

The Council of 100, an organization of black Republicans, many of whom are in business, "vehemently opposed" the Justice Department's position in the Dade county case, according to the council's chairman, Klaine B. Jenkins. The department's record on civil rights, she said, shows "not so much an obstruction of justice as an omission of justice."

Reagan campaign officials dismiss such criticism as partisan sniping when it comes from Democrats, but they take warnings from Republicans more seriously. James H. Lake, a spokesman for the Reagan campaign, said: "We recognize that for too many years, the Republican Party has not really developed an appeal for black voters. We could do a better job."

Mr. Lake said it was "outrageous" for people to suggest that the Administration would want to polarize public opinion on civil rights for political reasons. "President Reagan would not condone any activity that deliberately pits one group against another to gain political advantage," he said.

Mr. HAWKINS. Well, your hope is greater than mine. He indicated this morning that he hasn't changed. Do you agree with his position that his views today are the same as they were in 1983?

Mr. GOLDSTEIN. That is not what he said in a series of letters to the Attorney General in 1983. I can only interpret what Mr. Thomas thinks by what he puts on the public record. Perhaps he did in private conversations over a beer say he had questions with affirmative action which would lead him to oppose it, but that is not what he said on the public record.

Mr. HAWKINS. Thank you very much, Mr. Goldstein.

Next is Mr. William Robinson. We have your prepared statement, Mr. Robinson, and it will be entered in the record, without objection, in its entirety at this point, and you may proceed.

STATEMENT OF WILLIAM ROBINSON, DIRECTOR, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. ROBINSON. Thank you, Chairman Hawkins.

It is a pleasure for me to be here to appear before you and other members of the committee.

I appreciate your commenting that the entire statement is in the record and noting that the hour is moving along, I would like to rely on that and then not proceed to rehash the comments that are set forth in the paper.

Let me then make a few other remarks. First, let me note that in one sense I am glad that Clarence Thomas, who at a personal level I consider to be a friend of mine, has noted that these positions attributed to him in the newspaper are merely his personal views and do not reflect official policy of the agency. I would be much more upset if they were, in fact, official agency positions because that would, of course, give us a much greater problem.

While I have been critical of his personal remarks in my paper and I continue to disagree with him, I am, of course, not here this morning to bicker with Chairman Thomas over what are merely personal views. I join another friend, Barry Goldstein, in noting, however, that Mr. Thomas is not in a position where he can state purely private views and have them routinely accepted as such. He is chairman of the Equal Employment Opportunity Commission and publicly stated views on matters of EEOC policy will rarely be accorded the status of purely private remarks. I urge Clarence Thomas then to reach out for that point a little more vigorously and then, in turn, be considerably more careful with respect to his expression of personal views when being interviewed by media people because he is chairman of the EEOC.

Having said those things, I want to make a few additional remarks in just three areas.

First, I want to talk briefly about the use of guideline authority. Second, I want to talk briefly about the use of statistical proof, and then finally, I want to talk a bit about broad remedial authority by EEOC courts.

Let me start with the use of guidelines.

The use of guidelines and regulations is an important source of Federal power or influence. It is used in a variety of ways if you focus for a moment on the advertising guidelines at the time. EEOC promulgated its testing guidelines in 1966. There was fairly little learning. There was fairly little understanding of how this new law was going to affect the use of tests in employment.

EEOC reached out, grappled with that difficult problem and laid out some suggestions. They were good.

The courts, including the Supreme Court of the United States, then adopted these. Subsequently, those same views where reviewed by this body and again further adopted by this body and made the basis for further modifications of the law. That process started with guidelines but, I would suggest at that point those guidelines had a force and effect recognized indeed by the courts of more than just suggestions by the EEOC. They had acquired, indeed, the force of law, the imprimatur of law by this body. It is an entirely different matter now for Clarence Thomas and the other commissioners at EEOC to purport to undertake a broad review of the guidelines in their entirety and wholly inappropriate.

At this point, I would suggest that they would need to offer a very strong rationale prior to undertaking that type of an effort. I don't bedrudge them any prerogative of fiddling around on the edges with things that people can debate and disagree with, but any basic review of the guidelines, I suggest, is thoroughly inappropriate on their part and should require a strong rationale which they should be prepared to provide this body. I urge you to ask them for that.

There is another way in which guideline authority can be used so occasionally that the Supreme Court will render a decision which we all understand to be landmark but not completely clear like *Weber*.

We didn't understand exactly how it was going to apply, what circumstances and so forth. Guidelines issued by the EEOC sought then to explain how the principles of *Weber* can be used in other contests, a thoroughly appropriate use of guideline authority.

It strikes me, Mr. Chairman and members of the committee, as being wrong and wrong headed to say that you are to undertake a complete review of the affirmative action guidelines based on *Weber* without even having stopped to formulate a view of *Weber* which was, if I didn't mistake, the testimony of Chairman Thomas. I frankly think that is not good enough and that again he should be asked to provide his view of *Weber* before he undertakes to rewrite the affirmative action guidelines.

Why? What is his reasoning? I didn't hear any. I think some should be forthcoming. I urge that you seek it.

I would like to move now to the question of statistics. Barry Goldstein has given a primer on that. You can use statistics to demonstrate adverse impact requiring that an employer then come forward and demonstrate that his tests are indeed related to the job.

In another context, you can use statistics to show that there is such a viable disparity between the numbers of blacks hired for a position and the number of whites that it raises an inference of discrimination. Indeed, the Supreme Court on several occasions has said that where the statistics show a disparity of two or three standard statistical deviations in the hiring of blacks compared with what would be the expected norm, you have proven discrimination and you shift the burden of proof as a matter of law, not as a mere matter of procedural niceties, unless that employer comes forward and shows some nonracial reasons to explain away those statistics. If there is a violation, Mr. Chairman, and I ask Clarence Thomas, I guess historically since he is not here, under those circumstances a court just having concluded that a company is in violation of title VII because they failed to hire blacks to the extent of two or three standard statistical deviations, statistics alone, why shouldn't that same court then be permitted to require that that violation be cured by the employer hiring exactly the numbers of its violation?

I think that the courts can and do have that kind of authority. That that kind of broad relief that is the use of numerical remedies is effective. I disagree with my friend, Clarence Thomas, in his thinking that it doesn't actually work. I suggest that he ask members of his staff to provide him with the reports rendered by AT&T pursuant to the consent degree with EEOC which rely largely on numbers. Certainly the enforcement proceedings and the follow-up proceedings, show very clearly by the numbers exactly how goals and timetables work and work effectively.

Now, he sought to avoid that by making reference only to how it didn't work in the Federal work force. With respect to that, I would like to remind him that just a couple of years ago as this administration came into office, we, the lawyers committee and the NAACP Legal Defense Fund, among others, negotiated a consent decree with the Government that requires the Government to remove adverse impact in a number of jobs which previously were governed by the PACE test.

A few years have gone on now and there are some results. Reports have been prepared that Mr. Thomas can get access to merely by calling over to the Office of Personnel Management and if he would do so, he would see the extent to which removing adverse impact, which is the numbers, really works. It has worked in that instance to the tune of increasing the number of blacks hired last year fivefold over the proceeding year. That, I suggest, Mr. Chairman, is real effective relief.

I hope my friend, Clarence Thomas, will reconsider his opinion of that relief and not merely vote to allow the general counsel to continue to seek it, but indeed will, himself, become an advocate of it.

[Prepared statement of William L. Robinson follows:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON[1] AND RICHARD T. SEYMOUR,[2]

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman, and members of the Committee, we are pleased to be able to provide this testimony, but saddened by the need to present it. The Lawyers' Committee for Civil Rights Under Law, as you know, was founded in 1963 after President Kennedy invited the leaders of the American bar to the White House and asked them to establish a new organizaton to help provide legal services to blacks and other minorities. Over the last 21 years, the Committee and its local affiliates in a number of cities have represented blacks, Hispanics, and women in thousands of civil rights cases and in hundreds of employment discrimination cases. We have either represented the named plaintiffs, or filed amicus briefs, in many of the landmark cases interpreting the fair employment laws passed by Congress. The proper construction of Title VII, of its testing provisions, and of the various EEOC Guidelines adopted over the years to provide guidance to employers, to the Courts, and to litigants, have long been of deep concern to the Committee.

It is for these reasons that we view with deep concern the recent efforts by the Administration to weaken the antidiscrimination requirements of Title VII. These efforts include the Office of Personnel Management's espousal of the theory that all tests can automatically be presumed valide for all jobs—a view endorsed by the Staff Director of the Civil Rights Commission—and several recent public statements made by the Chairman of the EEOC. These efforts suggest three positions which cannot be reconciled with the meaning of Title VII, or with the decisions of the courts. First, Chairman Thomas has called into question the usefulness of statistical proof in determining whether a given employer requirement disproportionately excludes minorities or women from employment or promotion. Second, officials of OPM, the Staff Director of the Civil Rights Commission, and Chairman Thomas are urging that the existing standards for determining whether an employer has adequate justification for using such an exclusionary requirement be weakened, so that employers would prevail in more cases. The particular changes being advocated inside the Administration would, as a practical matter, mean that no employer could ever lose such a case. Third, Chairman Thomas has proposed changes in remedies which would shift the focus of relief away from benefitting the individuals or groups discriminated against, and towards an impractical and far less meaningful punitive search for those individual officials of the employer who were responsible for the discrimination.

Taken together, these proposals represent an attempted body blow to any chances of effective enforcement of Title VII. They seem to suggest that the Administration is proposing to turn its back on the consistent interpretations of the law urged by two Republican and two Democratic administrations, and upheld by a unanimous Supreme Court. They suggest that this Administration is seeking to change Title VII into a law requiring proof of discriminatory purpose before any remedy can be given, and so to limit injunctive relief as to take away the incentive of victims of discrimination to bring suit.

While Chairman Thomas may have been "thinking out loud" when he gave the statements, and may not have intended to indicate any substantive positions when he made them,[3] his remarks have at the least created great confusion over the future direction of the EEOC. If Chairman Thomas' recent statements were intended as a reflection of his considered views of the law, they are woefully mistaken and greatly harmful.

Part A of this statement (pp. 3-9) discusses the background and development of the principles challenged by these recent developments. Part B (pp. 9-19) discusses each of the developments, and their practical implications. Part C (pp. 19-21) discusses the likely consequences of such efforts.

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[1] Director, Layers' Committee for Civil Rights Under Law, 1400 "Eye" Street N.W. Suite 400, Washington, D.C. 20005.

[2] Director, Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law.

[3] Policy positions of the EEOC may be taken only by a vote of the full Commission, and the only vote held on any of these matters was a vote by the Commission to review the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607. That vote did not prejudge the outcome of the review, or call into question any of the longstanding principles of Title VII law which the Chairman's statements have challenged.

A. THE DEVELOPMENT OF THE PRINCIPLES OF FAIR EMPLOYMENT LAW CHALLENGED BY OPM AND BY CHAIRMAN THOMAS

When Congress enacted Title VII of the Civil Rights Act of 1964, it prohibited intentional discrimination and then went on to make it unlawful for an employer to: "(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." § 703(a)(2) of the Act, 42 U.S.C. § 2000e-2(a)(2).

Congress continued, in § 703(h) of the Act, 42 U.S.C. § 2000e-2(h): ". . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin."

The plain meaning of both provisions is that Title VII bars practices which were not intended to discriminate, but which "deprive or tend to deprive" protected groups from employment or advancement, and that tests which are not affected by intentionally discriminatory application are protected only if they are "professionally developed".

In 1966, a year after Title VII went into effect, the EEOC issued Guidelines interpreting the testing provisions of § 703(h).[4] They stated in part: "The Commission according interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class or jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. . . ."

Four years later, the EEOC issued a more elaborate set of testing guidelines intended to cover all objective selection criteria. The new EEOC Guidelines on Employee Selection Procedures[5] affirmed the central principle of the 1966 Guidelines, requiring that employers which use tests disproportionately tending to exclude members of minority groups or women have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job or jobs for which candidates are being evaluated."

The 1970 Guidelines were particularly valuable to employers, the courts, and fair employment plaintiffs because they relied heavily on professional standards developed by the American Psychological Association and because they gave fair notice of the standards which would be applied to any validation studies performed by employers. Prior to that time, most tests in use by private employers were simply sold to them "off the shelf", and were not supported by validation studies meeting professional standards. Other objective criteria, such as height requirements and high school degree requirements, were by and large adopted on the basis of "seat of the pants" feelings that the persons screened out by the requirements could not perform the job. No real attention was paid to the fact that such requirements screened out large numbers of minorities and women, and few employers bothered to do anything to check their assumptions that the persons screened out were in fact unable to perform.

In 1971, the Supreme Court spoke directly to this question in *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Duke Power had imposed a high school degree requirement for the company's better-paying jobs and departments at its Dan River Steam Station in North Carolina. Employees lacking a high school degree could be promoted into these jobs and departments by taking and passing the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. The Court found that the company had not acted with a discriminatory purpose, but the educational requirement and the tests were adopted "on the Company's judgment that they generally would improve the overall quality of the workforce." However, neither had been shown "to bear a demonstrable relationship to successful performance of the job for which it was used." 401 U.S. at 431. Writing for a unanimous Court, Chief Justice Burger stated:

"The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."

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[4] EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966.

[5] The 1970 Guidelines are set forth at 35 Fed. Reg. 12333 (August 1, 1970).

401 U.S. at 433. The Court went on to hold that the 1966 and 1970 EEOC Guidelines were supported by the Act and its legislative history, that there was "good reason to treat the guidelines as expressing the will of Congress", and that they are "entitled to great deference". 401 U.S. at 434. Summing up the Court's holding, Chief Justice Burger stated:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factors, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

401 U.S. at 436.

In 1972, Congress extended the coverage of Title VII to the Federal government, and to State and local governments.[6] The Committee reports and the debate focused on the *Griggs* decision, and on the need to ensure that the principles of *Griggs* were applied in Federal, State, and local public employment. For example, House Report No. 92-238 stated:[7]

"Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs."

Accordingly, Title VII was amended to cover most public employers.

The Supreme Court returned to the subject of testing in 1975, in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. Again, it reaffirmed the principles of the EEOC Guidelines:

"These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore note, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." . . . 422 U.S. at 431 (footnote omitted).

The Court continued: "The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'. . . ." Id.

In the same decision, the Court held that back pay awards in Title VII cases should not be limited to situations in which employers had shown bad faith, but should be the rule. One of the Court's reasons for so holding was that "the reasonably certain prospect of a backpay award" would provide "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices". 422 U.S. at 417-18.

Three agencies other than the EEOC have had some responsibility for enforcement of the fair employment laws. These are the Department of Justice, which has authority to sue State and local governmental employers under Title VII; the Department of Labor, which has authority through its Office of Contract Compliance Programs to enforce Executive Order 11246 barring discrimination by government contractor; and the former Civil Service Commission (now the Office of Personnel Management), which formerly had authority over questions of discrimination in Federal employment and which also has some enforcement authority as to State and local governmental employment under the Intergovernment Personnel Act.[8] In 1978, these three agencies and the EEOC joined in the issuance of the Uniform Guidelines on Employee Selection Procedures, 29 CFR Part 1607 43 Fed. Reg. 38290.

Much of the job advancement of members of minority groups and of women over the last two decades has been a direct result of these rules. The "reasonably certain" awards of back pay against employers, even if they are acting in good faith, does in fact spur employers to take a second look at exclusionary practices before suit is brought, and to look for alternatives which will be just as good in determining real qualifications and which will not have the exclusionary effect. This "spur" would not work, however, if employers did not know in advance the standards by which their tests and other selection standards would be judged.

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[6] Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103.

[7] 92nd Cong., 1st Sess., 1972 U.S. Code Cong. & Admin. News 2137, 2159.

[8] 42 U.S.C. §§ 4701 *et seq.*

B. THE ADMINISTRATION'S CHALLENGES TO THE GRIGGS RULE AND TO THE UNIFORM GUIDELINES

For some years, the officials of the U.S. Office of Personnel Management ["OPM"] responsible for developing the government's job tests have been pushing a new theory called "validity generalization". Based entirely on reviews of the published results of large numbers of validation studies, without any check of such studies to determine whether the studies reviewed had been performed in accordance with professional standards, and largely ignoring the likelihood that developers do not publicize their failures, they have concluded that the validity of tests is not limited to the particular jobs for which studies have been done, or to the particular situations in which the tests were used, and that the findings of validity are not even limited to the tests that were studied. The two main proponents of the theory are Dr. Frank Schmidt of OPM and Dr. John Hunter of Michigan State University. Writing in the October 1981 issue of American Psychologist,[9] they stated: "Professionally developed cognitive ability tests [1] are valid predictors of performance on the job and in training for all jobs . . . in all settings . . . ." (Citations omitted). Footnote 1, added by the editors, states:

> [1] The cognitive ability tests referred to throughout this manuscript are professionally developed, objective tests of verbal ability, quantitative ability, mechanical comprehension, spatial ability, and inductive and deductive reasoning that are widely used in personnel selection in industry and government.—The Editors

If this "validity generalization" approach is accepted, there would be no more need for any employer to perform any study of the validity of a test which operates to exclude minorities or women at a disproportionately high rate. Validity would always be presumed, and it would necessarily follow that no employer could ever lose a testing case.

We are concerned that the Department of Labor's U.S. Employment Service—which provides the funds for State Employment Services and develops tests for their use in deciding which applicants for referrals to employers should be classified as qualified to perform particular types of jobs—may be considering adoption of the "validity generalization" approach in its development of tests. While its validation studies have been of poor quality in the past, it might not even make a stab at performing such studies in the future. If the Department of Labor's Office of Contract Compliance Programs follows suit, the present standards applicable to government contractors would dissolve.

Moreover, changes in the Uniform Guidelines along the path proposed by Drs. Schmidt and Hunter would create enormous confusion in the courts. Literally thousands of plaintiffs and employers would then have to litigate the question whether the changes are consistent with Title VII, whether the new standards or the old standards should be applied, and even whether the courts should try to develop their own standards. Over several years, some scores of case would go up to the courts of appeals, and a handful of cases may have to go up to the Supreme Court, before the litigants and the courts would know definitely what the standards will be. In the meantime, enforcement of the law would suffer while the enormously expensive and time-consuming process of judicial clarification took place. During all this confusion, employers would also be deciding upon future selection procedures without any clear idea whether the procedures will ultimately be held lawful or not, and minorities and women will be harmed by the inevitable misjudgments.

This is no idle speculation. The Administrative Office of the U.S. Courts reports that more than 9,000 new fair employment lawsuits are being in court every year.[10] Many of these cases are settled, or are resolved within a couple of years by the courts' application of the present clear standards. Let the government throw doubt on these standards, however, and employers are likely to take their chances in litigation instead of accepting reasonable settlements, and are likely to appeal the trial courts' rulings against them.

Until now, the EEOC has been a firm bulwark against any notion that validity could simply be presumed. However, the Commission has recently decided to undertake a review of the Uniform Guidelines. The scope of the review suggests strongly that what the agency actually has in mind is a number of drastic limitations, including scrapping of the Guidelines, limiting them to unskilled jobs, their replacement by discriminatory-purpose standard, or the adoption of the validity generalization approach. A copy of the agenda for the review is attached as Attachment A. On p. 2 of the agenda, it expressly questions the holdings of *Griggs*.

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[9] Vol. 36, No. 10, p. 1128.

[10] See note 18 at p. 21 below.

Attachment B to this testimony is the text of an interview with Clarence Thomas, Chairman of the EEOC, with the Bureau of National Affairs' Daily Labor Reporter. The interview ran in the November 15, 1984 issue. In it, Chairman Thomas stated that the Uniform Guidelines were likely to be changed, that "one of the major moves in any new proposals will be to sever the input the American Psychological Association historically has had in issuing the earlier regulations". It is hard to understand why professional standards should be severed from the definition of a "professionally developed ability test", the phrase used in the language of § 703(h).

He also stated that he favored the elimination of remedies involving goals and timetables which he, curiously, thought difficult to monitor,[11] in favor of relief he thought would be more effective: "We're talking about things we can monitor," he said. "Like taking action against those who were responsible. We're going to start pushing in court for remedies against those individuals. For example, remove the head of the personnel office. Bring in new people. Actual changes." [12]

Attachment C to this testimony is a copy of the December 3, 1984 article in the New York Times making clear that the Administration is also challenging the use of statistical evicence in proving that selection procedures have a disparate impact, or in proving the existence of subjective discrimination. The courts have relied heavily on such evidence,[13] and it is important to note that a finding of disparate impact has, in the words of Judge Friendly of the U.S. Court of Appeals for the Second Circuit, only a "limited office":[14]

"We must not forget the limited office of the finding that black and hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume."

It is hard to understand how any plaintiff could prove that a test or other selection standard disproportionately excludes members of minority groups or women unless one counts the applicants and the selections. Chairman Thomas' approach would make it hard ever to get to the point at which an employer would have to justify its practices.

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[11] The abandonment of goals and timetables, and the insistence that no relief be accorded anyone who is not individually proven to be a victim of discrimination, ignores the essential fact that discriminatory employers do not discriminate bacause they want to exclude one or two particular blacks, Hispanics, or women, but because they want to exclude all such people or, failing that, as many as they think they can get away with excluding. Where the resolution of a case has taken years, many of the individual victims will no longer be available for the entry-level jobs at issue. To bar relief benefitting the groups formerly excluded means, in a very real sense, that the discriminatory employer has prevailed.

[12] Such a "remedy" would not redress the harm done to any victim of discrimination, and there would be no guarantee that the replacement would be any better. Just as fundamentally, Title VII makes no provision for such relief. Even if a change in the statute made it availabe, due process would require that any supervisor or official potentially at risk be made a party to the litigation, with his or her own right to counsel, to resist settlement, to appeal, and so forth. In the usual case, it would not be possible to identify at the beginning the officials who might at the end be found individually responsible for discrimination. Does one then make all management officials personal defendants in the lawsuit, each with his or her own lawyer? Would a class action with a defendant class of supervisors and officials have to be used in large cases?

If such an approach were used in testing cases, what would be the remedy? A suit to recover the testing consultant's fee? The firing of the manager who passed on the consultant's recommendation? The firing of each person who approved them going up the chain of command?

[13] Before reaching a finding of disparate impact, of course, the employer has always had a full and fair opportunity to chaallenge the statistical proof being used by the plaintiff in the case, and to put forth any statistical proof the employer regards as more relevant.

Chairman Thomas' references in the Times article to the Georgetown basketball team reflect a glib obfuscation of this principle, and overlook histoiry. Not too many years ago, a count of the participants in intramural and extramural college sports programs would have found them overwhelmingly to be male, and colleges and universities justified their lopsided sports expenditures for male students on the basis of such counts. Congress looked furether at the lopsided results, and consluded that there was pervasive discrimination against women in undergraduate athletics program. After Congress prohibited such discrimination, large numbers of women were for the first time able to participate. The performance of American women athletes in the 1984 Olympics bears eloquent testimony to the accuracy of Congress' judgment.

[14] *Vulcan Society of N.Y. City Fire Dept. v. Civil Service Commission*, 490 F.2d 387, 393 (2nd Cir., 1973).

The thrust of the statements of OPM, Civil Rights Commission, and EECO officials in the *Times* article is that selection procedures such as tests are presumptively valid, and that any requirement that employers demonstrate the job-relatedness of their selection standards somehow stand in the way of "merit" selection. The wil claims of some OPM officials that national productivity has declined because of employers' need to look at job-relatedness are all part of the same challenge to *Griggs*, and of the some insistence on proof of discriminatory purpose.

Finally, Attachment D to this testimony is a copy of Washington Post articles appearing on December 4, 1984. In it, Chariman Thomas states that he thinks *Griggs* "has been overextended and over-applied". Again, the statement tries to back up the claim of a nonexistent problem by an example of a situation which simply does not arise under current law: that of an employer which did not have many black engineers because few blacks have engineering degrees, and which is assertedly at risk under the *Griggs* standard.[15]

It has become regrettably clear from OPM's positions and from these statements that the Administration is preparing to engage in a wholesale assault on the *Griggs* standard and on the Uniform Guidelines, and that it seeks to immunize everything but intentional discrimination.

C. THE LIKELY CONSEQUENCES OF THE KINDS OF CHANGES BEING DISCUSSED BY THE ADMINISTRATION

We think it highly unlikely that the courts will accept the kinds of radical departures from twenty years of precedent envisioned by the Administration. What *is* likely, however, is that the proposed changes will, if adopted, lead to the above-described protraction of countless cases until definitive rulings have been handed down. The burden on our overworked courts, and the expense to litigants on both sides, will be enormous.

In conclusion, we believe that these efforts of Administration officials defy the intent of Congress in enacting Title VII of the Civil Rights Act of 1964 and in amending the law in 1972, are unlikely to succeed in the long term, but *are* likely to create enormous practical problems in the short term. It is a tragedy that the energy and resources of the government are being diverted into these barren channels instead of being spent in more effective enforcement of the law.[16] The governmental agencies charged with enforcement of the fair employment laws are not carrying the brunt of the enforcement workload, as Congress intended, but only a small portion of the burden.[17] It is time for them to stop pursuing baseless theories and buckle down to the serious business of enforcement.

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[15] Such an employer would never have been at risk under such facts, because it has long been accepted by the courts that the proper yardstrick by which to judge the performance of an employer is the percentage of blacks among the qualified applicants, or in the qualified labor force. Thus, for example, the Supreme Court held in *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13 (1977): "When special qualifications are required to fill particular jobs, comparisions to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In that case, a school district's employment of black teachers had to be compared with the percentage of blacks among teachers in the labor force.

[16] See the testimony of the Lawyers' Committee on the subject of the EEOC's litigation performance, given to this Subcommittee on October 28, 1983. We urged that the EEOC filed too few cases, that the charge processing system tended to reduce the scope of charges and blind the Commission to information charging parties may have about systemic discrimination, and that the separation of enforcement responsibility into an administrative side in charge of investigation and conciliation, and a litigation side in charge of court enforcement, was a serious impediment to any improvement. We believe that these criticisms are equally valid today.

[17] In the twelve months ending June 30, 1984, a total of 9,748 employment discrimination cases were filed in the U.S. district courts. The United States Government, including both the EEOC and the Justice Department and including both actions to enforce administrative subpoenas and substantive enforcement suits, brough only 258 new cases—a mere 2.6% of the total. Appendix I to the "Annual Report of the Director," Administrative Office of the U.S. Courts (preliminary print), Table C-2 at p. A-20 (1984).

The statistics were even worse in the preceding year. In the twelve months ending June 30, 1983, total government filings of new employment discrimination cases numbered only 170, out of a total of 9,097 new employment discrimination cases—1.9% of the total. "Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts" (1983), Table C-2 at p. 246.

To put the above figures in perspective, in FY 1983 the EEOC issued several thousand findings of reasonable cause to believe that there was discrimination against charging parties, yet the agancy filed only 214 lawsuits. This is a miniscule number of cases compared with the extent of the problem based on agency findings.

Mr. HAWKINS. Thank you, Mr. Robinson.

Just one question to ask of both the witnesses. In reading some of the statements made by Mr. Thomas and in the attempt to try to reconcile some of his views with just plain common sense as to what he was actually advocating and what were his motives for making such statements in the newspapers and to the media he indicated at one place, I don't recall the exact place, but he indicated that they would rely, in effect, on outreach efforts. By that he meant, I think, that by saying that where an employment directive or some employment personnel of a company discriminated against an individual that they would go after the individual who actually did the discriminating.

I don't know what precisely this would do to the one who brings the charge in the first place, the plaintiff, who was discriminated against, whether that individual would in any way be granted any relief if it just simply went out assuming that you would identify any company who actually did the discriminating and whether or not that would encourage the bringing of suits of discrimination, charges of discrimination against anyone because there would be no particular incentive to do so.

Would you, Mr. Goldstein, like to discuss that and then, Mr. Robinson, if you care to comment on it if this is going to be the main reliance of the agency in uncovering discrimination and providing any remedy by such a method, whether or not that is indeed practical.

Mr. GOLDSTEIN. Well, I guess the first response is that it is not legal.

Mr. HAWKINS. Well, I don't think they worry about that, but let's assume they can legitimize it in some way. I assume through legislation there is no bill pending on it, but let's assume that they can get around that total which is obviously a very difficult one. Am I correct that that was suggested by Mr. Thomas?

Mr. GOLDSTEIN. Yes, sir, absolutely.

Mr. HAWKINS. In some way, I don't recollect just exactly how I got that suggestion.

Mr. GOLDSTEIN. In the Daily Labor Report of November 15, 1984, which is attachment D, he suggested that we remove the persons responsible. Well, what a mess. I mean, first of all, if you are going to deprive someone of a property interest, their job, they have to have a right to defend themselves, how do you know ahead of time who is the one you would identify? Are you going to name all of the supervisors in a company? What about the people who supervise the supervisor? What about the chairman of the board who let's it go on? You could imagine how courts and the public would feel about replacing a personnel manager with 25 or 30 years of seniority because some circumstantial evidence which is mostly what we have and have to depend on to prove intentional discrimination has indicated that there was discrimination in the plant.

It is just not a practical remedy. It doesn't do anything for the victim of discrimination and you can imagine the animosity that would be created in a plant with a worker entering that work force who was responsible for one of the longstanding employees having been forcibly removed from his or her job. It just doesn't make sense.

Mr. HAWKINS. Can we just simply classify it as an off-the-cuff remark and probably go on to other questions?

Mr. GOLDSTEIN. Well, I wish we could and I don't think there could have been much thought behind it, but unfortunately the Daily Labor Report is something that is read by the practitioners in industry.

Mr. HAWKINS. It sounds somewhat fair to say that, "Look, we ought to go after the person who actually did the discriminating," and I assume individuals would support that idea without thinking it through and this is a danger, it seems to me, in these off-the-cuff remarks made by an individual who makes these statements without any basis on which to make the statement.

Mr. GOLDSTEIN. Yes, sir.

Mr. ROBINSON. I don't have anything to add, sir.

Mr. HAWKINS. I yield to Mr. Hayes.

Mr. HAYES. Time is of the essence, I realize. We have been here a little while, but I am bothered about a thing that I think is going to take on national implications that are currently going on in my home city of Chicago and I am sorry that Mr. Thomas is not here. But I am just wondering how do you apply—and I hope you two gentlemen here, one who is a counsel for the NAACP Legal Fund and the other who represents the legal group—how can any other group give us any sense of direction as to how to deal with a situation?

I want to interject this here at this point because you mentioned engineers. As you know, there has been a school strike in Chicago now going into the second week and it appears that one of the problems that the board of education is having to deal with now is the one involving the operating engineers. I just received a note here this morning that a complement of 634 engineers who happen to be white, and 75 who are black, 4 Hispanics, and 1 Asian, the issue, as I am advised now in the negotiations, is whether or not the board of education will continue to have a right to use the 75 blacks and 4 Hispanics and 1 Asian as the case might be, some of them from that grouping, not all of them as acting engineers or use what is being requested to, in effect, bypass this group because they are not qualified, they are saving money. And through this approach, yet these people are deprived of the right to take the examinations whether they can reach the category of full engineers.

It is a case of merit employment approach versus affirmative action approach. This is the issue involved which I know ultimately is going to reach, I think, the Equal Employment Opportunity Commission. I think the NAACP may ultimately get involved, but I think the bottom line, which concerns me, is the students who are out of school as a result of the strike and are being kept out almost primarily because of these issues because I think the monetary differences can be resolved from what I gather.

This is something that I know is going to reach national proportions and it has to be dealt with and I just want to know if there are any policy statements that I may advise the people involved, the two parties involved in these negotiations, that might help shorten that strike situation that you know of?

Mr. GOLDSTEIN. Congressman Hayes, you are obviously much, much more familiar with this situation in Chicago than I am and I think Mr. Robinson and I understand the thrust of your question. I haven't thought about it in that particular complicated context. I would be glad to discuss it with you.

Mr. HAYES. Think about it.

Mr. GOLDSTEIN. I will discuss it with you after I have had a chance to think about it.

Mr. ROBINSON. The Lawyers Committee for Civil Rights Under Law, has an office in Chicago. We worked quite a good deal with your predecessor and I am sure that office would enjoy very much the opportunity to work closely with you.

Let me leave with you my card and if you would be so kind as to have one of your staff people give me a call, I will put them in touch with some of my lawyers out in Chicago and we will see if we can't help you.

Mr. HAYES. We sure will.

Mr. HAWKINS. Mr. Hayes is trying to get legal counsel without having to go through the process of paying for it. We certainly commend him on his efforts to do so.

Mr. Goldstein and Mr. Robinson, we again express the appreciation of the committee for the efforts that you have given to us over the years. We certainly have relied on you. I think your statements have been carefully thought out and I simply hope that these troublesome days where we face the threat, I think, of the agency being demobilized, that we will continue to rely on those of you who seem to carry the burden of this. Unfortunately, the Federal agencies that are in charge of this resposibility are not doing their job. I think that is the fact and without outside groups such as the NAACP Legal Defense and Educational Fund and the Lawyers Committee for Civil Rights Under Law, those individuals who really are in need of assistance during these days when discrimination is leading to more unemployment and poverty and illiteracy and problems in our country, that the agencies primarily responsible for doing something about these problems are not doing their jobs.

I think it is most unfortunate. I think sometimes this committee has not conducted oversight as [illegible]ghly as we should because I think some of these things may [illegible]mes be thwarted by having these agencies report to us much more than what we have had them do. We will try to correct that and we certainly will again ask both of you to come before the committee time and time again to help us in this very difficult problem.

We certainly appreciate what you have done this morning.

Mr. ROBINSON. Thank you, Mr. Chairman.

Mr. GOLDSTEIN. Thank you, Mr. Chairman.

Mr. HAWKINS. That concludes the hearing this morning. The next hearing will be announced by the new chairman of this subcommittee during the next session of Congress. This is my last time serving as chairman of the subcommittee. I appreciate all that has been done and the cooperation and support of that effort.

Thank you.

[Whereupon, at 8:10 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[Material submitted for inclusion in the record follow:]

House of Representatives,
Government Activities and Transportation Subcommittee,
Washington, DC, January 2, 1985.

Hon. Gus Hawkins,
Chairman, Employment Opportunities Subcommittee,
Rayburn House Office Building, Washington, DC.

Dear Gus: Because of our shared interest in the Equal Employment Opportunity Commission and its current new directions, I would like to submit some remarks for the record of your December 14 hearing on this issue.

The House Government activities and Transportation Subcommittee, which I chair, held a hearing on July 25, 1984, on the refusal by the National Endowment for the Humanities to submit the goals and timetables for their affirmative action plan, as required by Federal statute.

In recent newspaper articles in which Chairman Thomas of the EEOC is quoted, I am surprised at his refusal to consider statistics as a valid measurement of progress or regression in employment. Statistics are not infallible, but they are one of several effective tools used to measure results.

The Congress and the courts have a long history of supporting affirmative action as a means of eliminating employment discrimination in this country. We are not supporting placing inept people in jobs. We are not advocating that individuals get a job only on the basis of race or color. We are not supporting blanket quotas.

What we are supporting is an opportunity for all people to compete for jobs in an open market place. Blacks were first brought to this country in 1619 as captives. They were not even recognized as human beings until the advent of the Civil War, when some fought to preserve slavery as a property and commercial rights and others fought to end it, based on human rights. It took almost 100 years of Civil Rights legislation—from 1865 to 1964—until true equal opportunities in housing, education, employment and advancement were guaranteed under the federal law. As President Johnson so aptly noted, you don't wipe out 2,000 years of discrimination with only two decades of effort.

Similarly, for women, affirmative action guarantees that all professional schools and trades must be open to women, based on their skills and potential for learning.

Women struggled to get the vote for 144 years. It took several more decades for them to win equal consideration for employment, education, property rights and personal freedoms.

But in spite of the many advances won for women and minorities, these individuals are still excluded from some jobs areas and restricted to others throughout business, industry and the federal government. How many women and blacks are school superintendents, police chiefs, top level military officials, college presidents?

Yet it is encouraging to note that women and minorities are making inroads into the political process via state assemblies, city halls, the Governor's office and the U.S. Congress.

We support your efforts, Representative Hawkins, to insist that the law be upheld and that numerical records be retained. The actual numbers of who holds what jobs, compared annually, is the best indicator of progress or failure in equal employment opportunity efforts throughout a company or an agency..

All federal officials who head an agency take a solemn oath to uphold the law, whether or not they agree or disagree with those laws. Compliance with the law is mandatory, not voluntary. Officials who feel they cannot meet this responsibility should step down their posts.

Mr. William Brown, III, a Philadelphia attorney in private practice and a former Chairman of the EEOC under President Nixon, most eloquently summed up this responsibility in his congressional testimony:

"The people, through their representatives, have decided that discrimination in employment is illegal, and have charged the Equal Employment Opportunity Commission with the enforcement of that law. Who can deny that laws which are flagrantly violated or poorly enforced weaken the entire fabric of our society and our system of justice?"

I fully agree.

We appreciate your concern regarding EEOC and look forward to your probing questions and rightful demand for more forthright answers.

Sincerely,

Cardiss Collins, *Chairwoman.*

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND,
Washington, DC, December 14, 1984.

Hon. AUGUSTUS F. HAWKINS,
Chairman, House Committee on Education and Labor,
Washington, DC.

DEAR CHAIRMAN HAWKINS: On behalf of MALDEF, let me commend you for your swift response to Chairman Clarence Thomas' published statements in the December 3, 1984 New York Times article, "Changes Weighed in Federal Rules on Discrimination." The hearing this morning should be helpful in clarifying Chairman Thomas' intent regarding the Uniform Guidelines on Employee Selection Procedures.

MALDEF shares the concerns, expressed in that article, by the NAACP Legal Defense Fund. The Uniform Guidelines on Employee Selection Procedures are the primary bulwark against arbitrary and discriminatory hiring practices. In fact, the Guidelines give substance to the often empty promise of the merit principle. It is therefore both regrettable and ironical that, in the supposed causes of "merit" and "efficiency", the opponents of fair employment practices are now trying to undermine the Guidelines.

The Guidelines were adopted in 1978 by unanimous agreement of all the federal agencies that are responsible for employment law enforcement as well as the government's own guardian of civil service employment practices. They all agreed that these Guidelines were faithful to the mandate of Title VII of the Civil Rights Act and other law, and also served the needs of the federal government, for an efficient, skilled workforce. The Guidelines' adoption in 1978 culminated a decade of refinement and debate based on the earlier guidelines of the EEOC.

The Guidelines were widely hailed then, and they have worked. The Courts have examined and approved them. Personnel officials report good results from hiring procedures complying with their standards. Ability to perform, not quotas, decides who is hired under the Guidelines' principles. But race or ethnicity cannot be used as the hidden hiring factor, where hiring cannot be shown truly based on job-related criteria.

Nothing has changed since 1978 except the political climate. The Guidelines are still detailed, correct statements of what the law and good personnel practices require. They are fair, they are understandable to personnel professionals, and they are consistent with the law's command of equal employment opportunity. Following the Guidelines is neither simple nor cheap. It is often not easy to identify and select the best candidate for a job, but a procedure that guides and pushes employers in that direction is cost-efficient.

The opponents of the Uniform Guidelines complain about the cost and complexity of following them. Those are the costs of fair and good hiring procedures, and they are worth it. The alternatives—arbitrariness and discrimination—are economically devastating as well as legally impermissible. Many of the opponents want a return to the comfortable world where management prerogatives had no limits, where they could hide behind useless tests that were inexpensive because they gave a superficial appearance of objectivity, where instead of "no minorities need apply" they could say "employment testing required" and achieve the same result. The Office of Personnel Management [OPM] is the worst offender. It runs not only the largest, but the most discriminatory employment operation in the country, and OPM is behind much of the current campaign to undermine the Guidelines.

MALDEF has worked in a cooperative spirit with Chairman Thomas and his staff and we will continue to do so, whenever possible. In this case, however, we regret that Chairman Thomas of EEOC has seen fit to lend his prestige and that of his agency to the opposition to some portions of the Guidelines. We regret it because he and EEOC are not among those who oppose the underlying goals of Title VII and the Uniform Guidelines. But such all-out opponents of EEO principles are numerous, although discreet in their public comments, both in the bureaucracy of OPM, the Justice and Labor Departments, and in private industry. Our resistance to their efforts to gut the Uniform Guidelines must be as strong as our commitment to eliminating discriminatory employment practices.

This is not the time to tinker with a successful, workable, and comprehensive set of regulatory principles. To open the Guidelines up to revision in the present political climate is to invite the enemies of Title VII to strike at one of its most important and positive consequences. We hope that there is still time for discussion with Chairman Thomas before any serious blows are dealt to these critical Guidelines.

Again, thank you for giving this issue the attention it deserves.

Sincerely,

HELEN C. GONZALES,
Associate Counsel.